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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA M. WOOD , et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1750
Patricia M. Wood, ET AL.
Plaintiffs, Appellees
v.
GENERAL MOTORS CORPORATION,
Defendant, Appellant.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. William G. Young, U.S. District Judge]

Before Campbell, *Chief Judge,* Selya, *Circuit Judge,*
and Laffitte, * *District Judge.*

David M. Heilbron with whom *Leslie G. Landau, McCutchen, Doyle, Brown & Enersen, Patrick F. McCartan, Stephen J. Brogan, Marc L. Swartzbaugh, Jones Day Reavis & Pogue, John P. Raleigh, Nicholas J. Wittner, Richard P. Campbell, John A.K. Grunert,* and *Campbell and Associates, P.C.,* were on brief for appellant.

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Joshua R. Kratka on brief for Massachusetts Public Interest Research Group, Amicus Curiae.

December 28, 1988

*Of the District of Puerto Rico, sitting by designation.

CAMPBELL, Chief Judge. The question before us is whether federal safety regulations preempt a state law claim, asserted in a federal diversity action, that a motor vehicle was defective because it lacked air bags.

This is an interlocutory appeal in a product liability diversity action brought in the United States District Court for the District of Massachusetts by plaintiff-appellee Patricia Wood against defendant-appellant General Motors Corporation. Wood has alleged that under Massachusetts law a vehicle manufactured by General Motors was defective because it was equipped with seat belts rather than air bags or some other type of "passive restraint." General Motors moved for summary judgment on the ground that Wood's state claim is preempted by the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381 *et seq.* (1982), and Federal Motor Vehicle Safety Standards promulgated under the Act. The district court denied the motion, *Wood* v. *General Motors Corp.*, 673 F. Supp. 1108 (D. Mass. 1987), and we have agreed to hear, in part, General Motors's interlocutory appeal from the court's action. 28 U.S.C. § 1292(b) (1982).

I. *BACKGROUND*

A. *Facts and Procedural History*

On May 19, 1981, appellee Patricia Wood was on her way home from school, riding in the front passenger seat of a 1976 Chevrolet Blazer. The Blazer, manufactured by appellant General Motors, was equipped with seat belts and complied with all applicable federal motor vehicle safety regulations. Wood was not, however, wearing her seat belt. For some reason other than a defect in the vehicle, the Blazer left the road and collided with a tree. Suffering severe injuries, Wood was rendered quadriplegic.

In May 1984, Wood brought an action for damages in the United States District Court for the District of Massachusetts, claiming that General Motors was liable for her injuries under Massachusetts state law theories of negligent design, negligent manufacture, and breach of implied and express warranty. One paragraph of the complaint alleged that:

> Defendant negligently failed to provide reasonably safe and adequate safety devices, which include but are not limited to "air bag" devices, to protect passengers and minimize the seriousness of injuries in reasonably foreseeable circumstances which include collisions[.]

General Motors moved for summary judgment on all claims. It characterized Wood's complaint as being wholly dependent on the theory that the Blazer lacked passive restraints (*i.e.*, safety devices that do not require any action by the passenger, *e.g.*, air bags or automatic seat belts), and was therefore defectively designed. Such a theory, General Motors argued, was both preempted by federal safety regulations and invalid under the Massachusetts law of product liability. After briefing and argument, the district court denied General Motors's motion for summary judgment.

General Motors then moved for immediate interlocutory appeal under 28 U.S.C. § 1292(b). The district court found that its denial of the motion for summary judgment met the statutory requirements, and authorized an immediate appeal. We granted in part General Motors's petition for immediate appeal, limiting our review to

> the question whether federal law preempts a state law product liability claim against a motor vehicle

manufacturer based on its installing seat belts, rather than airbags, in a motor vehicle.[1]

B. *The Safety Act*

The National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act" or "Act") was enacted by Congress in response to the "soaring rate of death and debilitation on the Nation's highways," S. Rep. No. 1301, 89th Cong. 2d Sess. 1, *reprinted in* 1966 U.S. Code Cong. & Admin. News 2709, 2709 [hereinafter "Senate Report"]. The Safety Act sought to increase automotive safety by authorizing the promulgation of federal "motor vehicle safety standards," hereinafter referred to as "FMVSS." 15 U.S.C. §§ 1391(2), 1392(a) (1982). The FMVSS, to be written and administered by the Secretary of Transportation,[2] were to be mandatory stand-

[1] This claim, under Massachusetts law, is a warranty claim for inadequate design. *Back* v. *Wickes Corp.*, 375 Mass. 633, 642, 378 N.E.2d 964, 970 (1978). The jury would be asked to determine on the basis of factors such as the gravity of the danger of the challenged design, the feasibility and cost of a safer alternative design, and the consequences to consumers of an alternative design, whether the present design was adequate. *Id.* While such a lawsuit, if successful, would not impose a legal duty, as such, upon the manufacturer to add air bags to other vehicles, it would obviously create a very strong reason to do so, since other accident victims could be expected to claim that their vehicles, too, should have had airbags and, if lacking them, were improperly designed.

[2] When passed, the regulatory authority under the Safety Act was delegated to the Secretary of Commerce. However, within several weeks of the Safety Act's passage, Congress created the Department of Transportation and transferred the administration of the Safety Act to the new department. *See* Department of Transportation Act, Pub. L. No. 89-670, § 6(a) (6) (A), 80 Stat. 931 (1966).

Within the Department of Transportation, the responsibility for writing FMVSS was at first delegated to the National Highway Safety Bureau. Exec. Order No. 11,357 (1967). In 1970, Congress transferred the administration of the Safety Act to the newly created National Highway Transportation Safety Administration ("NHTSA"). *See* Highway Safety Act of 1970, Pub. L. No. 91-605, § 202(a), 84 Stat. 1713,

ards which would apply to all new motor vehicles. The delegation was broad; the new law stated only that each FMVSS "be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. § 1392(a).

Congress envisioned that the FMVSS would be addressed to two types of dangers: 1) vehicle defects which caused accidents, and 2) vehicle defects that aggravated injuries to the occupants once an accident had occurred. The latter problem, sometimes labeled "crashworthiness," received special attention from Congress. Senate Report, 1966 U.S. Code Cong. & Admin. News at 2712. Within the field of crashworthiness, Congress focused especially on the problem of the " 'second collision" — the potentially devastating impact between the vehicle's occupants and the vehicle's interior.[3] The Senate Committee noted that the " 'second collision' . . . has been largely neglected," and that "[r]ecessed dashboard instruments and the use of seat belts can mean the difference between a bruised forehead and a fractured skull." Id. at 2710-11. This appeal concerns FMVSS 208, which is the most important FMVSS addressed to the problem of the second collision.

When framing the Safety Act, Congress indicated clearly its intention that the primary responsibility for setting standards regulating the national automobile manufacturing industry rested upon the federal government, not the states. The Senate Report stated,

> While the contribution of the several States to automobile safety has been significant, and justifies

1739. The current delegation to NHTSA is found at 49 U.S.C. § 105, 49 C.F.R. § 501.2(a) (1987).

[3] "Crashworthiness" encompasses more than protection from the second collision. *See, e.g.*, FMVSS 216, 49 C.F.R. § 571.216 (1987) (roof crush resistance); FMVSS 301, 49 C.F.R. § 571.301 (1987) (fuel system integrity).

> to the States a *consultative* role in the setting of standards, the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government.

Id. at 712 (emphasis added). The limited, consultative role of the states is reflected in two provisions of the Safety Act. First, 15 U.S.C. § 1392(f) states that in prescribing FMVSS, the Secretary "shall . . . consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate . . . ." Second, the Safety Act contains a preemption provision which explicitly preempts any state safety standard — even state standards which are *more* stringent than the federal standards — which covers "the same aspect of performance" as a federal standard but which is "not identical" to the federal standard. 15 U.S.C. § 1392(d).

With respect to safety standards implied under state *tort* law, however, the Safety Act's allocation of exclusive federal authority to establish automotive safety standards is less clear. Notwithstanding the above preemption provision, the Safety Act also contains section 1397, with the following general "savings clause":

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. § 1397(c). The Safety Act is thus ambiguous as to the current issue, to wit, whether a state product liability claim alleging improper design — which seeks to hold an automotive manufacturer liable for failing to adopt a standard "not identical" to a federal safety standard covering the "same aspect of performance" — is *preserved* by section 1397(c) and not preempted by section 1392(d), as would be the case were a Massachusetts law or regulation to have

required adoption of the very same standard (*i.e.*, provision of an air bag).

C. *FMVSS 208*

FMVSS 208, entitled "Occupant crash protection," has an intricate and contentious history of over 20 years. *See generally State Farm Mutual Automobile Insurance Co.* v. *Department of Transportation,* 680 F.2d 206, 209-18 (D.C. Cir. 1982) (hereinafter "*State Farm I*"), *vacated and remanded sub nom. Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 34-38 (1973) (hereinafter "*State Farm II*"); *State Farm Mutual Automobile Insurance Co.* v. *Dole,* 802 F.2d 474, 477-78 (D.C. Cir. 1986), *cert. denied,* 107 S. Ct. 1616 (1987) (hereinafter "*State Farm III*"). In this period, all three branches of the federal government have considered and, at times, forced changes in various aspects of the regulation. On at least three occasions, federal courts of appeals have considered the legality of FMVSS 208 under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq. See Pacific Legal Foundation* v. *Department of Transportation,* 593 F.2d 1338 (D.C. Cir. 1979) (upheld); *Chrysler Corp.* v. *Department of Transportation,* 472 F.2d 659 (6th Cir. 1972) (upheld in part and vacated in part); *State Farm III.* 802 F.2d at 474 (upheld). The Supreme Court, *see State Farm II,* 463 U.S. at 57, has vacated and remanded the standard. Congress, in overseeing its original delegation of authority in the 1966 Safety Act, has struck down a portion of FMVSS 208. *See* Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482 (codified at 15 U.S.C. § 1410b) (instructing the Secretary to amend FMVSS 208, and forbidding the Secretary from requiring, or permitting compliance by means of, ignition interlocks). In addition, Congress has amended the Safety Act so that the Secretary may not require *any* restraint system other than a seat and

shoulder belt system without giving Congress the opportunity to exercise a legislative veto. *See* 15 U.S.C. § 1410b(b). Finally, the Department of Transportation has drastically reversed the course of FMVSS 208 on at least two occasions,[4] and has made numerous less radical amendments.[5]

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[4] The first reversal occurred between the Ford and Carter administrations. In the twilight of the Ford administration, Secretary of Transportation Coleman reached a decision on the long-term version of FMVSS 208. *See* 42 Fed. Reg. 5071 (1977) (regulation issued on January 19, 1977). The Secretary chose to retain what was formally labeled an "interim" version of FMVSS 208, in which auto makers could choose between manual seat belts or passive restraints. In March 1977, the Carter administration reversed course and proposed a version of FMVSS 208 which would require passive restraints. 42 Fed. Reg. 15,935 (1977). A final rule requiring passive restraints was issued in July 1977. 42 Fed. Reg. 34,289 (1977).

The second reversal occurred soon after the Reagan administration assumed office. In February 1981 Secretary of Transportation Lewis reopened rulemaking on FMVSS 208. Two months later the Secretary proposed a rescission of the passive restraint requirement, and the proposal was finalized in October 1981. *See State Farm I,* 680 F.2d 206. The Supreme Court ordered the Secretary to vacate rescission of the passive restraint requirement because the "agency failed to supply the requisite 'reasoned analysis.' " *State Farm II,* 463 U.S. at 57.

In addition, the Ford administration's decision not to require passive restraints could be considered a reversal of sorts. Since 1970, the Department of Transportation had always stated that the "final" version of FMVSS 208 would require some sort of passive restraint. *See e.g.,* 35 Fed. Reg. 16,927 (1970) (promulgating a version of FMVSS 208 which required all passenger cars manufactured after July 1, 1973, to be equipped to protect vehicle occupants from crash-related injuries by means that required no action by the occupants).

[5] As of 1983, the Supreme Court counted about 60 rulemaking notices on FMVSS 208. *State Farm II,* 462 U.S. at 34.

Most of this national controversy has concerned the very issue which underlies Wood's state law claim, namely, whether seat belts are adequate to protect occupants from the harmful effect of the "second collision," or whether vehicles should be equipped with "passive restraints," *i.e.*, safety devices such as air bags that operate without the occupants' participation. Until recently, however, the controversy has not dealt with the role of state product liability law. In fact, the long, convoluted history of FMVSS 208 contains only a single, unhelpful reference to state design defect suits predicated on the theory that a car is defective if it lacks air bags.[6]

Despite this complex regulatory history, the portion of FMVSS 208 applicable to the 1976 Chevrolet Blazer has, for relevant purposes, remained unchanged since 1976. For the purpose of our preemption analysis, FMVSS 208 is the same whether one takes the regulation at the time of the Blazer's manufacture, at the time of the accident, at the time Wood's suit was filed, or at the time of decision. Under FMVSS 208, the 1976 Chevrolet Blazer is classified as a "multipurpose passenger vehicle, with GVWR [gross vehicle weight rating] of 10,000 pounds or less." 49 C.F.R. § 571.208, S4.2.2 (1987). For the protection of front seat passengers, manufacturers of such vehicles are given three separate options, compliance with any one of which will satisfy FMVSS 208:

1) passive protection from frontal and angular collisions;

2) passive protection from head-on collisions, sup-

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[6] In the NHTSA's July 1984 "final rule" on modifications to FMVSS 208, NHTSA included a "Summary of the Public Comments." NHTSA reprinted one commentator's prediction that manufacturers would be held liable for failing to install air bags. However, NHTSA made no indication whether it agreed or disagreed with the statement. *See* 49 Fed. Reg. 28,962, 28,972 (1984).

plemented by seat belts and a belt warning system; or

3) lap and shoulder belts, plus a belt warning system.

49 C.F.R. § 571.208, S4.2.2 (1987) (referring to S4.1.2.1, S4.1.2.2, and S4.1.2.3); *see also* 49 C.F.R. § 571.208, S4.2.2 (Oct. 1976).

It is uncontroverted that the Blazer complied with the third option (lap belts, shoulder belts, and a warning system) and, for that reason, complied with FMVSS 208. Wood's suit alleges, in effect, that the Blazer was defectively designed because it complied only with this third option, rather than with the first or second option, which calls for one or another form of passive restraint, *e.g.*. an air bag.

D. *The District Court Opinion*

The district court denied General Motors's motion for summary judgment based on federal preemption. General Motors had argued that under theories of "express preemption" or "implied preemption," or both, the Safety Act and FMVSS 208 preempted Wood's Massachusetts product liability claim. First, General Motors argued that section 1392(d) expressly preempted the state claim because it would, in the words of section 1392(d), "establish . . . [a] safety standard" which was not identical to FMVSS 208. The district court rejected this argument, reasoning that 1) the language of section 1392(d) seemed to apply to state regulations, and not to actions at law; 2) if Congress had meant to preempt defective design actions, it would explicitly have mentioned them in section 1392(d); 3) the savings clause, section 1397(c), refuted any express congressional intent to preempt product liability actions; and 4) the existence of a presumption against preemption.

Second, General Motors argued that a state action based on a failure to install air bags would produce an irreconcilable conflict with FMVSS 208 and would frustrate the objectives of the Safety Act. The court rejected the former argument, explaining that General Motors *could* comply with both FMVSS 208 and the state standard simply by installing air bags. The district court also used a broader rationale purportedly based on the recent case of *Silkwood* v. *Kerr-McGee Corp.*. 464 U.S. 238, 248 (1984): a product liability action does not conflict with federal safety regulations, the court thought, because even if a defendant manufacturer has to pay a damages award in this case, it need not alter its behavior in other instances. (Thus General Motors could, if it wished, continue to sell vehicles without passive restraints, taking its chances on future lawsuits similar to this one.) The court held further that Wood's claim would not frustrate the objectives of the Safety Act nor of FMVSS 208 because if it *did* have a regulatory effect, the result would be safer cars. The district court also recognized a "subsidiary purpose" of the Safety Act, namely, "Congress's intention that the safety standards be uniform throughout the country." It noted that the product liability suit might create some "tension" with this subsidiary purpose of the Safety Act, but held that under *Silkwood v. Kerr-McGee Corp.*, this tension was acceptable. It explained,

> Congress passed the Safety Act fully aware that damage suits would be initiated against parties who complied with the federal regulations. [Citations omitted.] This Court therefore concludes, as the Supreme Court did in *Silkwood,* that Congress recognized and sanctioned this "tension" between compliance with federal regulations and state common law claims. *See Palmer,* 633 F. Supp. at 1179 (citing and following *Silkwood* for similar reasons in not finding preemption by the Federal Cigarette

> Labeling and Advertising Act, 15 U.S.C. §§ 1331-41). 673 F. Supp. at 1117. The district court then elaborated on its reasoning that both the majority and dissenting opinions in *Silkwood* establish that damages awards have very little regulatory effect.

E. *Other Cases on the Same Issue*

In addition to the present action, about two dozen other suits have been recently filed claiming that an automobile was defectively designed because it lacked passive restraints. As yet, none of these cases has reached a federal appellate court or state supreme court. Courts have found both for and against preemption, with the majority ruling in favor of preemption.[7]

Against this backdrop, we now turn to the question certified to us.

II. *OUR CONCLUSIONS SUMMARIZED*

In this interlocutory appeal, General Motors presses the argument that Wood's claim is both expressly and impliedly preempted by FMVSS 208 and section 1392(d) of the Safety Act. While we do not find an express preemption, we agree that Wood's claim is impliedly preempted.

Preemption is a matter of congressional intent. As a unanimous Supreme Court recently said,

> A pre-emption question requires an examination of congressional intent. . . . Of course, Congress explicitly may define the extent to which its enact-

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[7] Finding preemption, *e.g.*: *Baird* v. *General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Cox* v. *Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover* v. *Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986).

Denying preemption, *e.g.*: *Murohv* v. *Nissan Motor Corp.*, 650 F. Supp. 922 (E.D.N.Y. 1987).

> ments preempt state law. See, *e.g.. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96 (1983). In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*. 331 U.S. 218, 230 (1947). Finally, even where Congress has entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).' " *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419, 1425 (1987), quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

Schneiderwind v. *ANR Pipeline Co.*, 108 S. Ct. 1145, 1150-51, (1988) (citations modified).

We find the Safety Act facially ambiguous as to Congress's intent in the present situation. The difficulty arises because section 1392(d) (the preemption clause) and section 1397(c) (the savings clause) send conflicting messages in these particular circumstances. For plaintiff Wood

to win on her design claim, it must be judicially determined under state law that vehicles like hers are unsafe unless equipped with air bags. That finding is tantamount to announcing a state safety standard (vehicles must have air bags) that differs from the federal safety standard covering the same aspect of performance (viz., the relevant federal standard permits seat belts in lieu of air bags). 15 U.S.C. § 1392(d). Such a safety standard, if promulgated by state statute or regulation, would be preempted by the clear commands of section 1392(d). Is the same standard preempted even though created by lawsuit? Section 1392(d) says nothing about being limited to *legislatively* established state standards. However, section 1397(c) of the Safety Act provides that compliance with a federal safety standard shall not be a defense to common law liability. Arguably this "preserves" a state or federal diversity court's right to create such a standard notwithstanding its conflict with the relevant federal standard.[8]

Broadly speaking, two analyses are possible. The one adopted by the court below — which has the virtue of simplicity — is to harmonize sections 1392(d) (the preemption clause) and 1397(c) (the savings clause) by ascribing to Congress an intent to preempt contradictory state safety standards when promulgated by statute or regulation, but *not* to preempt such standards when established in the course of a lawsuit. Congress is said to welcome, for some reason, the "tension" between the federal safety standards

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[8]As we later discuss, this is not a case where compliance with the federal standard is pleaded as a defense to plaintiff's tort claim. Rather the argument is that because plaintiff's claim relates narrowly to design, and because the alleged faulty design (no air bags) necessarily implies a state standard requiring air bags, which standard flatly conflicts with a relevant federal safety standard, the case raises an issue of preemption. Preemption is a concept both narrower and different from an ordinary defense. *See* Section IVD, *infra*.

and any dissimilar state standards created by litigation — even though Congress strictly forbade the states to create dissimilar standards by statute or regulation.

The alternative analysis — which we prefer as being a more plausible view of Congress's intentions — begins with an examination of the historical setting within which Congress, in 1966, wrote the Safety Act. At that time, the only kind of legal claim which could give rise to the present dilemma — a cause of action based upon alleged automobile design defects had yet to take its place in the arsenal of the plaintiffs' bar. We infer from this, as well as from the total silence of the legislative record concerning the present dilemma, that Congress simply did not anticipate the situation that now confronts us.[9] While Congress intended that federal safety standards would not interfere with ongoing state litigation as then understood, it did not foresee the possibility of litigation that could, in practical effect, impose a new and conflicting state safety standard on national automobile manufacturers. Had Congress done so, we think, the same logic that dictated the insertion of section 1392(d) would inescapably have dictated that section 1392(d) extend to this situation.

Nonetheless, given Congress's failure to foresee this problem, we are not persuaded that section 1392(d) can be construed to manifest an *express* intention to preempt state design lawsuits having the present effect. By the same token, we do not construe the general language of section 1397(c) as intended to preserve the narrow class of design lawsuits that give rise to a conflicting state safety standard. We,

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[9]Further diminishing foreseeability was the fact that the Safety Act authorizes the promulgation of *performance* standards, rather than *design* standards, so that, even if Congress had foreseen the existence of defective design litigation, a direct conflict between a common law design standard and a Safety Act performance standard — as exists here — would be a rare event indeed. *See* Section IVC, *infra*.

therefore, reject General Motors's argument that the Safety Act works an express preemption, but we also reject Wood's contention that Congress meant by the savings clause to express approval of the "tension" that would ensue if federal safety standards and contradictory litigation-created state design standards were to co-exist. Rather, we think Congress simply overlooked the possibility of the present dilemma, resulting in a statute that lacks clear and express direction on the subject.

While we, therefore, do not find express preemption, we are convinced that Congress's purposes, as revealed in the Safety Act and in the legislative history, plainly *imply* a preemptive intent. The instant product liability claim alleging that the absence of an air bag rendered the vehicle's design faulty would, if upheld, clearly "stand as an obstacle" to the regulatory scheme of the Safety Act. A state common law action sustaining the theory that a vehicle was defective because it lacked an air bag would, in effect, create a state safety standard related to the same aspect of performance of FMVSS 208 but not identical to FMVSS 208. Such an action is, in our view, impliedly preempted because it would effectively circumvent section 1392(d)'s prohibition of non-identical state standards covering the same aspect of performance as a federal safety standard. Allowing a common law action holding manufacturers liable for failing to install air bags in motor vehicles would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area.[10]

While our approach, as just stated, is clear, the arguments pro and con involve countless details and byways. In

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[10] We, of course, do not imply that section 1392(d)'s prohibition immunizes the manufacturer from liability for defective design of an air bag.

the following sections of this opinion, we explore these matters extensively.

III. *PREEMPTION*

A. *What Congress Meant*

The language of the Safety Act sends conflicting signals on the preemption of state actions for faulty design that could establish a safety standard not identical to a federal standard. The potential for ambiguity in special circumstances like the present is reflected in the preemption clause and the savings clause. The preemption clause provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1392(d). The savings clause provides:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not

> exempt any person from any liability under common law.

15 U.S.C. § 1397(c).

General Motors and Wood each use the provision favorable to its or her viewpoint to construct arguments that Congress *expressly* meant either to preempt or to preserve the instant tort action. General Motors argues that as "no State . . . shall have *any* authority . . . to establish . . . *any* safety standard applicable to the same aspect of performance . . . which is *not identical* to the Federal standard," *id.* § 1392(d), and as an air bag suit would create a state air bag standard nonidentical to FMVSS 208, Congress expressly meant to preempt this type of action. Wood argues that preempting her theory of liability would effectively "exempt" General Motors from liability, and that Congress has expressly forbidden such a result: "compliance with *any* Federal motor vehicle safety standard . . . does not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(c). The district court accepted this latter reading of congressional intent. It expressed the view that

> Congress passed the Safety Act fully aware that damage suits would be initiated against parties who complied with the federal regulations. . . . This Court therefore concludes, as the Supreme Court did in *Silkwood*, that Congress recognized and sanctioned this "tension" between compliance with federal regulations and state common law claims.

673 F. Supp. at 1117.

We agree with neither General Motors's reading of Congress's express intent nor with that of Wood and the district court. We instead reach a third conclusion: Congress in 1966 did not contemplate the likelihood that there

would be a state tort action that would effectively create a state design standard conflicting with a federal safety standard. As it did not envisage this peculiar type of lawsuit, and as no reason appears in the legislative history or comes to mind as to why Congress would have meant to endorse a state claim having the same effect as a forbidden state regulation, we do not find that Congress meant to sanction the "tension" between the FMVSS and state common law existing in the current situation.[11] This interpretation of the Safety Act and of Congress's intent is first suggested by the very fact that the two provisions, read alone, yield such different results. If Congress had considered the instant type of tort claim in these facts, it would scarcely have left unexplained such a glaring ambiguity. Our reading is supported by the state of tort law when the Safety Act was passed in 1966 and the legislative history of the Act.

1. Common Law in 1966

In determining questions of preemption, a court "must examine the [act's] language against the background of its legislative history and historical context." *California Federal Savings & Loan Association* v. *Guerra,* 107 S. Ct. 683, 691 (1987). Examining the historical context of the Safety Act's enactment in 1966, we find it unlikely that anyone in Congress would have considered the possible preemption of certain defective design actions because there was, up to 1966, hardly any experience at all with cases of that type. Until the Eighth Circuit's seminal decision in *Larsen* v. *General Motors Corp., 391 F.2d 495 (8th Cir. 1968)* (allowing the jury to decide whether a vehicle with a rigid steering linkage which caused severe injuries to the driver in a front-end collision was defectively designed), persons injured in

[11] We thus disagree with the district court's assertion that Congress was "fully aware" of this type of damages action. All the evidence seems to us strongly to the contrary. *See infra*.

automobile accidents seldom sued manufacturers on a theory of design defect, and with the exception of one decision involving a bus, *see Carpini* v. *Pittsburgh & Weirton Bus Co.*, 216 F.2d 404 (3d Cir. 1954), they did not prevail. As one commentator noted in 1956, "[t]here is a dearth of reported cases where negligence in design was urged by plaintiff as a basis for liability." Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 Harv. L. Rev. 863, 863 n.5 (1956). The commentator concluded that "[i]t is indeed striking to observe how ineffective the law has been to date in doing anything about effectuating improvements in design to alleviate the daily 'blood bath of automobile inspired tragedy.' " *Id.* at 873 (citation omitted).

Courts were hardly more active in the ten years between the writing of that comment and the passage of the Safety Act. In 1967, an article co-authored by Ralph Nader decried the failure of courts to promote automotive safety:

> However, this trend [toward increased liability] has not extended to automobile manufacturers' liability for unsafe design of passenger cars. While a number of suits involving unsafe design have been settled, plaintiffs have had little luck on the trial court level. On appeals, plaintiffs are batting zero. The appellate courts have yet to reverse a judgment for a manufacturer or affirm a judgment for a plaintiff in a case involving a traffic accident allegedly caused by the unsafe design of an American passenger car.

Nader & Page, *Automobile Design and the Judicial Process*, 55 Calif. L. Rev. 645, 645-46 (1967). *See also* Recent Cases, 80 Harv. L. Rev. 688 (1967) (case comment on *Evans* v. *General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966)); Note, *Manufacturer's Liability for an "Uncrashworthy" Automobile*. 52 Cornell L.Q. 444 (1967). Seen in this context, it would

not be surprising for the Congress which enacted the Safety Act to have failed to perceive the possible conflict between state defective design suits and the new federal motor vehicle safety standards.

We do not mean to suggest that broadened design liability, as reflected by *Larsen* v. *General Motors Corp.*, was entirely unforeseeable. At least since 1916 manufacturers had been held liable for *manufacturing* defects which caused accidents. *See MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). Furthermore, the Restatement of Torts contained a general principle of liability for defective design. *See Restatement of Torts* § 398 (1938).[12]

However, despite the theoretical possibility of bringing them, defective design actions against automobile manufacturers were an unpromising and for that reason, virtually non-existent breed in 1966. First, it was not at all clear just how the law relative to design would be applied. In an early article advocating increased liability for defective design, Professor Noel noted that

> in the design cases, particularly those involving widely-used products made by established manufacturers, judges and juries have been understandably hesitant to impose liability. This hesitation results partly from a reluctance to let a jury pass on a product prepared by experts in the field,

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[12] The section provides that

> A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel lawfully or to be in the vicinity of its probable use for bodily harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

Restatement of Torts § 398 (1934). *See also Restatement (Second) of Torts* § 398 (1965).

> and partly from the realization that a judgment for a particular plaintiff may open the door to many additional claims and suits.

Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product,* 71 Yale L.J. 816, 816 (1962). *See also* Nader & Page, 55 Calif. L. Rev. at 653-54 (noting that although-courts recognize "some sort of duty with respect to design," "a duty with respect to design which is defined in terms so narrow as to eliminate virtually any possibility of finding breach of duty differs little from a judicial determination that no duty exists."). Indeed, as of 1966, no plaintiff had yet prevailed on a claim that an automobile was defectively designed. In the legal climate of 1966 one could not tell to what degree, if any, design defect suits would ever have an effect on automobile safety.

Furthermore, prior to the *Larsen* decision, plaintiffs had an especially tough burden if they alleged not that the design defect caused the accident but that a design defect made a car less safe in an accident or in other situations of misuse — types of defects which, as noted above, were a special concern of the Safety Act. Under either the theory of "intended use" or "patent danger," *see* Note, 52 Cornell L.Q. at 447-49, a plaintiff would likely lose because the automobile was not intended to be misused or because plaintiff should have been aware of the alleged defect and was thus solely at fault. *See, e.g., Amason* v. *Ford Motor Co.*. 80 F.2d 265 (5th Cir. 1935) (alleged defective design was passenger door hinged at the rear and a door handle which could catch a passenger's hand, resulting in the death of plaintiff when he tried to open and shut the door while the car was moving at high speed; summary judgment affirmed for defendant because decedent's actions were not "ordinary use" and decedent should have known of the danger); *Poore* v. *Edgar Brothers Co.*, 33 Cal. App.2d 6, 90 P.2d 808 (Cal. Dist. Ct. App. 1939) (alleged

defective design was the use of plain glass rather than safety glass in automobile door; demurrer upheld for defendant because "the glass in [automobile] windows is not intended to withstand blows as part of its ordinary use") ; *Muncy* v. *General Motors Corp.*, 357 S.W.2d 430 (Tex. Civ. App. 1962) (alleged defective design was ignition key switch which allowed key to be removed while car was running and in gear, resulting in accidental injury to a pedestrian; plea of privilege upheld for defendant because driver was "well aware" of the design of the key switch and because driver failed to use the car for its intended purpose).[13]

In fact, the very year that Congress passed the Safety Act, a federal appeals court ruled that a plaintiff had failed to state a claim by alleging that a car was uncrashworthy. *See Evans* v. *General Motors Corp.*. 359 F.2d 822 (7th Cir.), *cert. denied.* 385 U.S. 836 (1966) (alleged design defect was the use of an X-shaped frame which lacked protective side rails). The court invoked the doctrines of intended use — "The intended purpose of an automobile does not include its participation in collisions" — and patent danger — "A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle 'more' safe where the danger to be avoided is obvious to all." *Id.* at 824-25. The *Evans* court explained that requiring manufacturers to design crashworthy cars might be a desirable goal, but that "that would be a legislative function, not an aspect of judicial interpretation of existing law." *Id.* at 824.

Congress may or may not have known of the *Evans* decision when it passed the Safety Act, but *Evans* plainly shows that in the historical context of 1966, persons then

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[13] One decision did allow a claim that a *manufacturing* defect rendered a vehicle uncrashworthy. *See Ford Motor Co.* v. *Zahn*, 265 F.2d 729 (8th Cir. 1959).

concerned with automobile safety would likely have attached little practical importance to claims of design defects alleged to have rendered a car uncrashworthy.

Even if Congress foresaw defective design lawsuits, a further reason Congress would not have anticipated the current preemption problem is that, even among the body of lawsuits claiming defective design, only a few would be likely, as here, to establish what is in practical effect a new safety standard. This is so because the Safety Act authorizes promulgation of "performance" rather than design standards as such. 15 U.S.C. § 1391(2). Although, as this case shows there can be a direct clash between a standard for performance and for design, *see* Section IVC, D, *supra,* it will be rare that a design standard established in a lawsuit will overlap and conflict with a performance standard established under the Safety Act.

We conclude that it is unrealistic to ascribe to the authors of the Safety Act, and to Congress generally, an awareness that in the years ahead a new breed of state tort actions would be developed from which design standards might emerge that, on some rare occasion, might create a direct conflict with a particular FMVSS. Thus when Congress inserted the savings clause, it did not contemplate that lawsuits would be brought with the potential to give rise to the current dilemma.

2. The Legislative History

The legislative history of the Safety Act likewise indicates that neither the preemption clause nor the savings clause specifically addressed the status of conflicting design standards established through the mechanism of common law suits for defective automobile design. Neither party has directed us to a single legislative reference to actions for design defects. Instead, the legislative history, like the savings clause itself, employs more general terms such as

"common law standards of care," Senate Report, 1966 U.S. Code Cong. & Admin. News at 2720, "rights of parties under common law particularly those relating to warranty, contract, and tort liability," H. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966), "common-law remedy," 112 Cong. Rec. 19,663 (1966) (remarks of Representative Dingell), and "common law on product liability," 112 Cong. Rec. 14,230 (1966) (remarks of Senator Magnuson). These, as indicated above, would not before 1966 have been based upon claims of inadequate design.

The fullest discussion in the legislative history of the Safety Act's impact on state law leaves the exact same ambiguity as the Act's conflicting preemption and savings clauses. The Senate Report has a brief section with the promising title, "Effect on State Law":

> **EFFECT ON STATE LAW**
>
> The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country. At the same time, the committee believes that the States should be free to adopt standards identical to the Federal standards, which apply only to the first sale of a new vehicle, so that the States may play a significant role in the vehicle safety field by applying and enforcing standards over the life of the car. Accordingly, State standards are preempted only if they differ from Federal standards applicable to the particular aspect of the vehicle or item of vehicle equipment (sec. 104).

> The States are also permitted to set more stringent requirements for purposes of their own procurement. Moreover, the Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would not necessarily shield any person from product liability at common law.

Senate Report, 1966 U.S. Code Cong. & Admin. News at 2720. On the one hand, "State standards are preempted only if they differ from Federal standards." On the other hand, the Safety Act "need not be interpreted as restricting State common law standards of care." The dichotomy, we believe, reflects a Congress that never had occasion to consider what would occur if a state product liability action itself created an overlapping automobile design standard so similar to FMVSS as to raise the question of the former's preemption by the latter.[14] Instead Congress had in mind the then cus-

[14]The statements of Senator Magnuson and Representative Dingell cited in Wood's brief are no more illuminating than the Senate Report. Senator Magnuson's statement that "compliance with Federal standards would not necessarily shield any person from broad liability at common law" is paired with the observation that "[t]he centralized, mass production and high volume character of the manufacturing industry requires that the safety standards be not only strong and adequately enforced but, as I say, also uniform." 112 Cong. Rec. at 14,230. Representative Dingell stated that "we have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer, and they can be exercised against the manufacturer." *Id.* at 19,663. However, Representative Dingell's remarks were made in opposition to an amendment which would have provided criminal penalties for manufacturers who violated the federal safety standards. He argued that state tort suits would be an additional incentive for manufacturers to comply with federal standards, and thus that criminal penalties were not required. In this context, Representative Dingell's remarks refer to

tomary "State common law standards of care" pertaining to the negligent operation or manufacture of vehicles, coupled, no doubt, with warranty claims then customary, none of which had the potential to create the present problem.

We accordingly divine no specific congressional intent in section 1392(d) expressly to preempt an action of the present type. Nor do we construe the savings clause (section 1397(c)) as reflecting any specific congressional concern to preserve design actions such as the present which would, in effect, create standards different from federal safety standards promulgated under the Safety Act.

B. *Implied Preemption*

Having found that Congress did not, in the language of the Safety Act, make an explicit statement regarding preemption of state claims that create, in effect, a state design standard not identical to a federal standard, we turn next to whether the Safety Act *impliedly* preempts the present action. *Cf. International Paper Co.* v. *Ouellette,* 107 S. Ct. 805, 812 (1987) ("Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact preempts [state law]."). [15] The kind of implied preemption that would be applicable here is "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind* v. *ANR Pipeline*

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state tort suits which enforce federal standards, and not to suits which would create different standards.

[15] Wood argues that the savings clause, section 1397(c), precludes any use of implied preemption analysis. We have already touched upon this above, pointing out Congress's unawareness in 1966, when the savings clause was enacted, that lawsuits would give rise to what are, in effect, state design standards. For this and other reasons discussed at length later in this opinion, we reject Wood's argument that the savings clause precludes implied preemption. *See* Section IVB, *infra*.

Co., 108 S. Ct. 1145, 1151 (1988) (citing *Hines* v. *Davidowitz, 312 U.S. 52, 67 (1941)). See, e.g. Hyde Park Partners, L.P.* v. *Connolly.* 839 F.2d 837 (lst Cir. 1988) (holding that the Williams Act preempted the Massachusetts anti-takeover statute; the state law stood as an obstacle to Congress's preferred balance between management and shareholders); *Hernandez-Colon* v. *Secretary of Labor,* 835 F.2d 958 (lst Cir. 1988) (holding that the Job Training Partnership Act preempted a Puerto Rico law giving the Governor veto power over the formation of intermunicipal bodies; the state law stood as an obstacle to the federal law's equilibrium between state and local interests).

In a case decided after the district court had ruled on General Motors's motion for summary judgment, the Supreme Court made clear that in implied preemption analysis, one must look to interference with Congress's chosen method as well as to the ultimate goal of the statute. *See International Paper Co.* v. *Ouellette,* 107 S. Ct. 805 (1987). *Ouellette* dealt with the implied preemption of common law water pollution suits by the Clean Water Act ("CWA"). The Court explained,

> In determining whether Vermont nuisance law "stands as an obstacle" to the full implementation of the CWA, it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal.

Id. at 813 (citing *Michigan Canners & Freezers Association* v. *Agricultural Marketing & Bargaining Board,* 467 U.S. 461, 477 (1984)).

We believe that this "stand as an obstacle" type of preemption preempts Wood's design defect claim based on the absence of an air bag. Even though the goal of Wood's

design defect action might be the same as that of the Safety Act — that is, to increase automobile safety — Wood's theory of recovery is preempted by FMVSS 208 and the Safety Act because it interferes with the method by which Congress intended to meet this goal.

Our analysis, set out below, has three steps. (1) A state regulation requiring passive restraints would be expressly preempted by section 1392(d) of the Safety Act. (2) Wood's state law tort action would have an effect similar to such a prohibited state regulation. (3) As Wood's design defect claim, if successful, would have the same effect as an impermissible state regulation, it is preempted because it stands as an obstacle to Congress's chosen method for achieving auto safety.

1. A State Air Bag Regulation Would Be Preempted

There is no question but that a nonconforming air bag or other passive restraint *regulation* issued by the Massachusetts legislature or state or local agency would be expressly preempted by section 1392(d) of the Safety Act. The state *regulation* might provide, for example, that "all vehicles registered in this State must be equipped with passive restraints." The federal standard, as applicable to multipurpose vehicles like the Blazer, has three optional modes of compliance, any one of which would be acceptable: vehicles must be equipped with seat belts and shoulder harnesses, with passive restraints, *or* with some combination of lap belts and passive restraints. 49 C.F.R. § 571.208, S4.1.2. Comparing the federal standard and hypothetical state regulation, the state regulation is "applicable to the same aspect of performance" as the federal standard, but is "not identical" to the federal standard. Whereas the federal standard allows seat belts and shoulder harnesses alone, the hypothetical state regulation requires passive restraints. Thus, the

state standard is expressly preempted by section 1392(d), which provides that "no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard."

In the hypothetical regulation presented, which is directly applicable to the present case, application of section 1392(d)'s preemption of standards "applicable to the same aspect of performance" as a federal standard is neither difficult nor controversial. However, in order to show the high degree of conflict between such a state standard and FMVSS 208, we elaborate on just why a state air bag regulation is preempted by section 1392(d) and FMVSS 208.

The key issue in deciding whether a state regulation is preempted by section 1392(d) is defining the "aspect of performance" addressed by the applicable FMVSS. The question is difficult and important: depending on how broadly one defines the "aspect of performance," the federal regulation will have either a broad or narrow scope of preemption. Fortunately, in *Chrysler Corp.* v. *Rhodes*, 416 F.2d 319 (lst Cir. 1969), this court already has outlined the procedure for deciding the "aspect of performance" of a FMVSS.

In *Chrysler Corp.* v. *Rhodes,* the question was whether a New Hampshire regulation prohibiting the sale of cars equipped with a supplementary light for night driving (the "Super Lite") was preempted by FMVSS 108, which regulated "lamps, reflective devices, and associated equipment." FMVSS 108 had no provisions directly addressed to the Super Lite. Nonetheless, Chrysler claimed that the New Hampshire regulation was preempted by FMVSS 108 and section 1392(d). Chrysler argued that the "purpose and

scope" section of FMVSS 108 established the "aspect of performance" for purposes of preemption under section 1392(d). FMVSS 108, section 1, provided:

> *Purpose and scope*. This standard specifies requirements for lamps, reflective devices, and associated equipment, for signalling and to enable safe operation in darkness and other conditions of reduced visibility.

416 F.2d at 322. Relying on this section, Chrysler argued that the "aspect of performance" addressed by FMVSS 108 was "safe operation in darkness," and that a state regulation covering the Super Lite was preempted because it too related to safe operation in darkness. We rejected this argument.

> While "the purpose and scope" section of a federal standard may well be the starting point in defining "aspect of performance," the inquiry cannot end there. In our view, resort must be had to the specific requirements and categories of the standard . . . .

Id. at 325. As FMVSS 108 had no specific requirements addressed to items like the Super Lite, we held that the New Hampshire regulation was not preempted.

In this case, the state air bag regulation is not preempted solely because it falls within the broad purpose and scope provisions of the federal standard.[16] Rather, the air bag

[16] FMVSS 208 has separate "scope" and "purpose" sections:

> S1. *Scope*. This standard specifies performance requirements for the protection of vehicle occupants in crashes.
>
> S.2. *Purpose*. The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropo-

regulation is preempted because it is addressed to "the same aspect of performance," no matter how narrowly one defines that term, as the federal regulation. First, by including passive restraints as an option for complying with FMVSS 208, NHTSA has left no doubt that passive restraints are within the "aspect of performance" addressed by the federal standard. Furthermore, the history of FMVSS 208 shows irrefutably that passive restraints are within the "aspect of performance" covered by the standard. All of the regulatory changes, lawsuits, and congressional actions have focused on the same question as that presented by Wood's lawsuit: are seat belts adequate to protect occupants in crashes, or are passive restraint required? *See* pages 8-11, *supra*. In these circumstances, we have no doubt that a hypothetical state air bag regulation would be addressed to the same "aspect of performance" as FMVSS 208, and would thus be expressly preempted by section 1392(d) of the Safety Act.

2. Wood's Tort Action Would Have An Effect Similar To A State Regulation

If Wood prevailed in her defective design claim, the effect would be similar to state promulgation of the hypothetical state air bag regulation discussed above. The Supreme Court has recognized the regulatory effect of damages awards.

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

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morphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

49 C.F.R. § 571.208.

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236, 247 (1959). In *Palmer* v. *Liggett Group. Inc.*, 825 F.2d 620 (lst Cir. 1987), this court recently held that a state tort suit was preempted because it had a regulatory effect. *Palmer* involved the preemptive scope of the Federal Cigarette Labeling and Advertising Act as applied to a state tort suit based on a theory of inadequate warning. Like the Safety Act, the Labeling Act forbade states from imposing different labeling requirements, but did not *expressly* mention state tort suits. We thus accepted plaintiff's argument that the tort suit was not expressly preempted. Nonetheless, we ruled that the suit was impliedly preempted because it had a similar effect to direct state regulation. We explained that if this suit were not preempted, it would "arrogate[] to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies." *Id.* at 628.[17]

The Massachusetts Supreme Judicial Court has similarly acknowledged that the purpose of automobile design defect suits is to set state design standards, and that such suits have much the same effect as legislative standards. In *Smith* v. *Ariens*, 375 Mass. 620, 377 N.E.2d 954 (1978), the Supreme Judicial Court considered whether it would follow *Evans* v. *General Motors Corp.* (not allowing suits based on uncrashworthiness) or *Larsen* v. *General Motors Corp.* (seminal case allowing suits based on uncrashworthiness, *see supra*). The court decided to follow *Larsen*, explaining as follows:

> The major argument against the imposition of liability for negligent design which results in en-

[17] We are well aware, as Wood vigorously asserts, that *Palmer* is distinguishable from the present case. Unlike the Safety Act, the Labeling Act was designed to protect the tobacco industry as well as to increase safety. In addition, the Labeling Act had no savings clause. However, with respect to the regulatory effect of a state tort suit, *Palmer* is directly applicable.

> hanced injury is that the Legislature, rather than the judiciary, should determine design standards. See *Evans* v. *General Motors Corp.* . . . However, as noted in *Larsen,* "[t]he common law is not sterile or rigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time. The common law standard of a duty to use reasonable care in light of all the circumstances can at least serve the needs of our society until the legislature imposes higher standards."

Smith v. *Ariens,* 375 Mass. at 624-25, 377 N.E.2d at 957 (citing *Larsen* v. *General Motors Corp.,* 391 F.2d at 506).

Wood argues that her suit will have no regulatory effect because General Motors has the choice of paying the damages award without modifying the design of its vehicles. This argument might have some force in certain cases, if, for example, the claimed design defect was highly particular to the vehicle involved, or the accident was in some way unusual. With respect to a claim that a vehicle is defective because it lacks air bags, however, it seems obvious that a damages award will have a pronounced effect on the manufacturer's future conduct. The same theory of recovery could be pursued by every front seat occupant injured in a multipurpose vehicle. It is well known that injuries to front seat occupants are frequent; well over 20 lawsuits have been filed on the theory of absence of air bags in the last two years. *See* section I.E *supra.* In these circumstances, General Motors's choice to avoid modification of its design "seems akin to the free choice of coming up for air after being underwater." *Palmer,* 825 F.2d at 627.

We also disagree with the district court's statement that in *Silkwood* v. *Kerr-McGee Corp.*. 464 U.S. 238 (1983), the

Supreme Court "found that the impact of such [tort] awards should be considered narrowly."[18] 673 F. Supp. at 1117. *Silkwood*, in fact, *affirms* that tort awards have regulatory effect. The issue in *Silkwood* was the preemptive scope of federal nuclear safety regulations on state tort law. Nuclear safety was a difficult area because Congress had enacted two potentially conflicting sets of laws. On the one hand, the Supreme Court had recently decided that federal safety regulations occupied the field of nuclear safety, precluding any direct state regulation. 464 U.S. at 240-41. On the other hand, Congress had enacted the Price-Anderson Act, 42 U.S.C. § 2210 (1982), which limited the aggregate liability of nuclear facilities resulting from accidents. The very existence of the Price-Anderson Act implied that Congress intended that nuclear facilities be liable for damages caused by nuclear accidents.

The specific issue in *Silkwood* was whether a plaintiff could receive *punitive* damages; her right to compensatory

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[18] This court has already indicated our disagreement with this interpretation of *Silkwood*. The district court's reading of *Silkwood* was adopted at least in part from the district court's opinion in *Palmer* (the Cigarette labeling case). The *Palmer* district court had argued that *Silkwood* discredited the *Garmon* reasoning that tort suits have a regulatory effect. In reversing the *Palmer* district court, we rejected this argument:

> The district court evidently believed that *Garmon*'s reasoning had been discredited by the Supreme Court's decision in *Silkwood* — even though nothing in *Silkwood* even remotely suggests that *Garmon* has been qualified or overruled, and even though the Court in *Silkwood* stated that federal law will "preempt the recovery of damages based on state law" whenever "imposition of a state standard in a damages action would frustrate the objectives of the federal law."

Palmer, 825 F.2d at 628 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 256).

damages was unquestioned. The defendant argued that as punitive damages are imposed solely to change conduct, these types of damages were impliedly preempted. In a 5-4 decision, the Court found that punitive damages awards were not preempted.

The Court's reasoning, however, affirmed that compensatory damages awards have a regulatory effect. It agreed with the defendant that "there is a tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability." 464 U.S. at 256. The "tension" was that "the award of damages based on state law is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards." *Silkwood* does not support the proposition that damages awards lack regulatory effect.[19]

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[19] The district court also relied upon a partial sentence in a footnote in a dissent joined by four members of the Court - "[t]here is no element of regulation when compensatory damages are awarded." *Silkwood*, 464 U.S. at 276 n.3 (Powell, J.). Aside from the general problem with drawing principles of law from dissents, the district court quoted the statement out of context. Justice Powell, in dissent, was attempting to highlight the differences between compensatory damages (which all Justices agreed to be permissible) and punitive damages. In making this argument, he wrote,

> The distinction in this case between the two types of damages is of major importance. There is no element of regulation when compensatory damages are awarded, especially when liability is imposed without fault as authorized by state law.

Id. This statement does not apply to all suits for compensatory damages, but to those areas of law, like nuclear power, where the defendant may be found liable without any finding of fault. *See generally Restatement (Second) of Torts* § 519 (the general principle of abnormally dangerous activities). In contrast, automobiles are not "abnormally dangerous," and General Motors in this case can only be found liable if

We recognize that in *Silkwood,* after thoroughly examining the legislative history of the Price-Anderson Act, the Court held that Congress *intended* that there be a "tension" between the Price-Anderson Act and the exclusive federal control of nuclear safety. As the Court explained, since Congress decided to tolerate this tension, "[w]e can do no less." Wood insists that the present case is just like *Silkwood* — Congress intended there to be a tension between the savings clause (section 1397(c)) and the preemption provision of the Safety Act, and it is the courts' duty to abide by this congressional decision favoring tension. We find no parallel, however, between the circumstances here and in *Silkwood*. Wood is unable to suggest any convincing reason why Congress would want to encourage states to impose an inconsistent safety standard of this nature by lawsuits but not by regulations. We shall discuss this further below.

3. The Air Bag Suit Is Impliedly Preempted

We think it plain that Wood's action, if successful, would stand as an obstacle to Congress's chosen *method* of increasing automobile safety. *See Ouellette,* 107 S. Ct. at 813. While "courts should not lightly infer preemption," Wood's product liability action must bow to the supremacy of federal law because it disturbs the Safety Act's allocation of authority between the federal government and the states. *Id.* at 811.

Congress, in enacting the Safety Act, set up a clear division of authority between the states and the federal government. If the federal government has not issued a safety standard on a certain aspect of performance, the states are allowed to set their own standards in these areas.

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the jury finds that the Blazer was defective because it lacked air bags. If indeed Massachusetts law did place accident liability on automobile manufacturers *regardless* of whether the vehicle was defectively designed, then compensatory damages would have less of a regulatory effect.

However, Congress decided that once the federal government had promulgated a standard, the states' usual role in setting safety standards was subordinated in the interest of national uniformity. When a federal standard is in effect, the states are prohibited from establishing a nonidentical standard, *see* 15 U.S.C. § 1392(d) ; and their role is then limited to enforcing the federal standard, *id.,* and to issuing higher, standards for vehicles procured for their own use. *Id.* The states are also free to consult with federal authorities. *Id.* at § 1392(f).

This division of authority between state and federal government was part of Congress's chosen method for implementing the Safety Act. Congress believed that for the federal standards to be effective, they had to be uniform throughout the country. *See* 15 U.S.C. § 1392(d); Senate Report, 1966 U.S. Code Cong. & Admin. News at 2720 ("The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.").

Congress thus intended that all of the FMVSS, including FMVSS 208, be uniform national standards. A state *regulation* requiring passive restraints would be expressly preempted because it would destroy the uniformity of the federal standard, and exceed the Safety Act's prescribed role for state regulation. By the same token, a defective design action which, if successful, effectively would require the installation of passive restraints, would likewise destroy the national uniformity of the federal standard and exceed the state's authority. Thus, although Wood's air bag suit is not expressly preempted by the Safety Act, it is impliedly preempted because it presents an "actual conflict" with the Safety Act — specifically because it "stands as an obstacle"

to Congress's determination that safety is best served by having uniform national standards.

Wood's response, as already indicated, is that Congress manifested its intent via the savings clause to allow Wood's air bag suit notwithstanding its direct impact on the uniformity of federal standards, and notwithstanding Congress's refusal to allow the states to mandate air bags through direct regulation. As preemption is always a question of congressional intent, we would, of course, find no preemption if we were satisfied that Congress did, in fact, intend to allow the courts to accomplish what a state was otherwise prohibited from doing. We are not, however, so convinced.

The Supreme Court in *Silkwood* did not lay down some kind of general rule that "tension" between federal regulation and clashing state product liability law is generally favored. *Silkwood* merely held, on its own facts, that such tension was there envisaged by Congress. In *Silkwood*, the Court had the entire Price-Anderson Act as evidence that Congress intended that nuclear facilities would be subject to common law liability. The availability of state actions for compensatory damages was, indeed, uncontested. The only issue was the availability of punitive damages, and the Court observed that "punitive damages have long been a part of traditional state tort law." In contrast, the only evidence here of a possible congressional intent to sanction the handful of design defect actions that might create standards which clash directly with federal standards is section 1397(c), a general savings clause which applies to the universe of state tort actions. As earlier explained, automobile design defect actions, particularly ones based on a theory of uncrashworthiness, were not in 1966 an established "part of traditional tort law," and the legislative history gives no evidence that Congress anticipated the present dilemma. For this and other reasons discussed below, the language in the savings clause

refusing to exempt persons from liability under common law because of compliance with a safety standard does not reflect Congress's intention to avoid preemption of those few and unique *design* actions that would have the effect of creating a state safety standard in direct conflict with an existing FMVSS.

In *Silkwood*, moreover, regulations implementing the Price-Anderson Act specifically mentioned punitive damages, indicating that the federal agency believed that punitive damages were allowed. *Id.* at 255. In this case, there is no comparable signal from NHTSA indicating that state product liability actions should be allowed to establish state safety standards that conflict directly with relevant federal standards.

Less obvious, but even more important, the preemption claimed by the defendant in *Silkwood* was more akin to the "occupy the field variety" than the "actual conflict" type (which applies in this case). In *Silkwood*, the theory of liability did not focus on any specific portion of the nuclear facility's design nor on any particular procedure of the defendant. Accordingly, the suit had little potential for establishing a state safety standard; the opinion never discusses a single federal safety standard that was potentially threatened by a judicially created state standard. The court was careful to state that if a common law suit did present an actual conflict with federal law, the suit would be preempted.

> We do not suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law. But insofar as damages for radiation injuries are concerned, pre-emption should not be judged on the basis that the Federal Government has so completely preoccupied the field of safety that state remedies are foreclosed but on whether there is an

> irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damage action would frustrate the objectives of federal law. We perceive no such conflict or frustration in the circumstances of this case.

Id. at 256. We believe the Court would be much less willing to find that Congress created a "tension" between federal law and state common law when the state law, as here, evidences an actual conflict. Where Wood's action creates an actual conflict, *Silkwood* offers little support for Wood's contention that Congress intended state product liability suits to impose standards that would disrupt the uniformity of federal safety standards.

We conclude that the air bag claim, being in direct conflict with federal safety standards, is impliedly preempted by the Safety Act, and that the savings clause does not evidence a contrary congressional intention.

IV. *OTHER ARGUMENTS*

A. *The FMVSS are Not Merely Minimum Standards*

Wood argues that because the Safety Act defines the FMVSS as *minimum* standards, they cannot preempt more stringent state standards.[20] This argument has no merit. Although the standards are "minimum" in the sense that a manufacturer may make a vehicle safer than required by

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[20] The definitional section of the Safety Act includes the following provision:

> "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and provides objective criteria.

15 U.S.C. § 1391(2).

federal law, the standards are not "minimum" in relation to state law. Section 1392(d) provides that states are forbidden from establishing standards not "identical" to a federal standard. Thus section 1392 preempts state standards which are either more or less stringent than the federal standard.

B. *The Savings Clause Does Not Foreclose Implied Preemption*

Wood argues that two recent Supreme Court cases establish the following "principle": when a statute contains a savings clause, "it is not within the province" of a court to engage in implied preemption analysis. Applying this principle, Wood argues that "Congress has expressly stated its intention" to preserve the state air bag claim, and that we should thus not look at implied preemption.

We disagree both with Wood's "principle" and with the proposed application of the principle to this case. With regard to the latter point, the Safety Act, even on its face, does not express an unambiguous intent to preserve a state suit that conflicts with a federal safety standard. As noted in Section IIIA, above, the Safety Act contains *both* a savings clause which would preserve the claim and a preemption provision that would preclude the claim. Neither provision can be read in isolation, and thus we have no choice but to look beyond the face of the statute to find Congress's intent with respect to preemption of the air bag claim. Thus even if Wood's principle were correct, it would not apply in the present case.

Moreover, Wood's proposed principle is not supported by the Supreme Court cases on preemption. Wood mainly relies on *California Federal Savings & Loan Association* v. *Guerra,* 107 S. Ct. 683 (1987), which addressed the preemptive scope of the pregnancy discrimination provisions of the Civil Rights Act. Wood in particular focuses on Justice

Marshall's statement[21] that because the Civil Rights Act has two savings clauses, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the [act]." *Id.* at 690. Wood fails to mention, however, that one of the savings clauses in the Civil Rights Act provides, in effect, that implied preemption analysis must be applied to state laws. *See* 42 U.S.C. § 2000h-4 (preempting state laws that are "inconsistent with any purposes of this Act, or any provision thereof"). Accordingly, Justice Marshall stated that part of his inquiry was whether the state law was "inconsistent with the purposes of the statute." Thus Wood's proposed principle — which applies in situations where a savings clause arguably forecloses the use of implied preemption analysis — has absolutely nothing to do with *Guerra* — a situation where the "savings clause" mandates implied preemption analysis. In fact, it is ironic that Wood cites Justice Marshall's opinion to argue against implied preemption — both Justice Scalia, concurring separately, and Professor Tribe have criticized Justice Marshall's opinion for ranging too far afield in its implied preemption analysis. *See id.* at 697 (Scalia, J., concurring in the judgment); L. Tribe, *American Constitutional Law* s 6-26, at 482-83 n.8 (2d ed. 1988).

The other case cited by Wood, *California Coastal Commission* v. *Granite Rock Co.*, 107 S. Ct. 1419 (1987), also fails to support the principle that a savings clause prevents a court from applying implied preemption analysis. *Granite Rock* involved a facial challenge to a system of state mining permits on the basis of preemption by several federal laws. One of these laws, the Coastal Zone Management Act ("CZMA"), had a broadly worded savings clause, and the Court relied on this clause to hold that the CZMA did not preempt the state

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[21]This quotation is taken from Part III-A of *Guerra*, which was joined only by a plurality of the Court. *Id.* at 686.

law in question. *Id.* at 1430. However, as *Granite Rock* involved a facial challenge to the state law, the Court only held that the CZMA did not "occupy the field"; the Court also stated that state law might be preempted if there was an actual conflict with the CZMA. The Court wrote that the CZMA did not preempt state law "except in cases of actual conflict," and that "the CZMA does not *automatically* preempt *all* state regulation." *Id.* at 1430-31 (emphasis added).

If there is a general principle with respect to the application of implied preemption analysis to statutes with general savings clauses, it may be closer to that advocated by amicus curiae Product Liability Advisory Council: "general savings clauses may not be read literally to permit common law actions that contradict and subvert a statutory scheme." There are Supreme Court cases that support this view. In *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co. (Abilene).* 204 U.S. 426 (1907), the question was whether a shipper's common law suit to recover an unreasonably high shipping charge was preempted because the railroad had filed its rate schedule with the Interstate Commerce Commission ("ICC"). The shipper, arguing against preemption, relied on a savings clause in the "act to regulate commerce." The clause provided

> Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

Id. at 446. In spite of this clause, the Court proceeded to engage in-implied preemption analysis:

> [A]s it is conceded that the act to regulate commerce did not in so many words abrogate such [common law] right, it follows that the contention that the right was taken away by the act to regulate

> commerce rests upon the proposition that such result was accomplished by implication.

Id. at 436. The Court went on to hold that the shipper's common law suit was "wholly inconsistent" with the administrative scheme of the Commerce Act, and that the shipper could not proceed with its suit.

In the recent Supreme Court decision addressing the preemptive scope of the Clean Water Act ("CWA"), the Court again used implied preemption analysis despite the presence of a broad savings clause. The issue in *Ouellette* was whether interstate nuisance suits (*i.e.*, suits brought by a plaintiff in one state against a polluter in another state) were preempted by the CWA. The CWA contains two broad savings clauses, including the following provision:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . .

33 U.S.C. § 1365(e). Despite this provision, the Court held that the CWA did "not speak directly to the issue" of preempting interstate nuisance suits, because the provision started with the words "nothing in this section" (which was the only section dealing with private causes of action) rather than the words "nothing in this law." 107 S. Ct. at 812. The Court then proceeded to apply implied preemption analysis, and found that interstate nuisance suits were preempted unless they employed the law of the source state. Otherwise, the Court explained, the common law action would disturb the balance between source states and affected states, and would interfere with the CWA's policy of having predictable standards. *Id.* at 814.

Although the Court in *Ouellette* found some ambiguity in the CWA's savings clause, the decision shows a general reluctance by the Court to follow a savings clause if state law will actually conflict with a federal regulatory scheme. The Court explained that "we do not believe that Congress intended to undermine this carefully drawn statute through a general saving clause." *Id.* at 812. The Court also implied that in certain statutes the savings clause might be a boilerplate provision that Congress did not mean to apply in cases of actual conflict. The Court wrote:

> The fact that the language of [the saving clause] is repeated *in haec verba* in the citizen suit provisions of a vast array of environmental legislation . . . indicates that it does not reflect any considered judgment about what other remedies were previously available or continue to be available under any particular statute.

Id. at 812 n.14 (quoting *Milwaukee* v. *Illinois.* 451 U.S. 304, 329 n.22 (1981)).

Abilene and *Ouellette* belie the supposed principle that a general savings clause precludes a court from looking into implied preemption. On the other hand, we do not adopt the opposite conclusion — that implied preemption always applies.. Rather, in each case the question requires a close reading of the statute and a thorough examination of congressional intent. In this case, the ambiguity created by section 1392(d) in combination with the savings clause, combined with the paucity of design defect suits at the time the Safety Act was passed, leads us to conclude that Congress would have intended to preempt any state standard like this (even though established through the medium of a design lawsuit rather than by a state regulation) that, in the parlance of implied preemption analysis, "actually conflict[s]" with the Safety Act.

C. *Performance Standards v. Design Standards*

Plaintiff argues that a state product liability action can never conflict with a FMVSS because product liability actions establish *design* standards, while under the Safety Act, NHTSA may only promulgate *performance* standards. *See* 15 U.S.C. § 1391(2) (" 'Motor vehicle safety standards' means a minimum standard for motor vehicle performance, or motor vehicle equipment performance . . ."). A performance standard establishes a test for a certain aspect of a vehicle's performance, without mandating how the vehicle should be designed to comply with the test. As explained by the Senate Report

> The Secretary would thus be concerned with the measurable performance of a braking system, but not its design details. Such standards will be analogous to a building code which specifies the minimum loadcarrying characteristics of the structural members of a building wall, but leaves the builder free to choose his own materials and designs.

Senate Report, 1966 U.S. Code Cong. & Admin. News at 2714.[22] In contrast, a design standard mandates how a vehicle or item of vehicle equipment should be designed, and does not dictate how the product should perform in response to certain tests. We agree with Wood that the usual common law action for design defect, like the present one claiming that the Blazer was defectively designed because it lacked air bags, creates a design standard rather than a performance standard.

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[22]Congress preferred performance standards, rather than design standards, because "performance standards are . . . not intended or likely to stifle innovation in automotive design." *Id.*

Merely stating the difference between design and performance standards, however, does not lead to the conclusion that a state design standard will never conflict with a federal performance standard. First, although design and performance standards are analytically distinct, in practice the line is not so clear. For example, a performance standard requiring that a vehicle's driver should be able to see in the dark is not very different from a design standard requiring that a vehicle have lights. Similarly, although FMVSS 208 is a performance standard dealing with the protection of occupants from the second collision, it specifies that vehicles must either have seat belts meeting certain criteria or have other safety equipment (passive restraints) that will protect occupants from the second collision.[23] By requiring seat belts or passive restraints, FMVSS 208 has elements of a design standard.

Second, although the Safety Act provides that NHTSA should develop performance standards, the Safety Act's preemption provision is not limited to any one type of standard. Section 1392(d) provides that "*any* safety standard applicable to the same aspect of performance" as a federal standard is preempted. The above discussed hypothetical state regulation — requiring all vehicles registered in the state to be equipped with air bags — is a *design* standard. Yet, as we discussed above, such a state standard is unquestionably related to the same aspect of performance as FMVSS 208, and is thus expressly preempted by section 1392(d). Similarly, if a state product liability action would establish a design standard related to the "same aspect of performance," as that term is defined narrowly in *Chrysler* v. *Rhodes* as a federal standard but not identical to the federal standard, then it is impliedly preempted by the Safety Act.

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[23]In FMVSS 208, a vehicle's ability to protect occupants from the second collision is stated "in terms of forces and accelerations measured on anthropomorphic dummies in test crashes." 49 C.F.R. § 571.208.

D. *Preemption v. Raising FMVSS as a Defense to a Design Defect Claim*

Wood claims that "General Motors' preemption argument has been specifically addressed and rejected in other Circuits." The cases cited by Wood fail to support this assertion. Not a single appellate decision addresses the question of the implied preemption of a state law cause of action *that would effectively create a state standard not identical to a federal standard, in violation of section 1392(d).*

Instead, the cited cases hold that compliance with a federal safety standard does not serve as a defense on the *merits* of a defective design claim. *See. e.g.. Shipp* v. *General Motors Corp.,* 750 F.2d 418 (5th Cir. 1985); *Sours* v. *General Motors Corp.,* 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Dawson* v. *Chrysler Corp.,* 630 F.2d 950, 957-58 (3d Cir. 1980), *cert. denied.* 450 U.S. 959 (1981). In each of these cases, the defendant manufacturer argued that the vehicle could not have been defectively designed because it complied with applicable FMVSS. This argument is summarily rejected, usually in a single paragraph. *See Shipp,* 750 F.2d at 421 ("Of course, compliance with such minimum safety standards does not exempt or immunize a manufacturer from common law strict liability"); *Sours.* 717 F.2d at 1517 ("[T]he very federal safety statute upon which General Motors relies makes it abundantly clear that compliance with the regulations promulgated thereunder does not immunize a manufacturer from common law liability."); *Dawson, 630 F.2d at 958 (*"Compliance with the safety standards promulgated pursuant to the National Traffic Motor Vehicle Safety Act, however, does not relieve Chrysler of liability in this action."). We have no quarrel with our sister circuits' holdings that compliance with a FMVSS is not a defense on the merits to a claim of design defect.

The issue in this case — implied preemption of a state product liability suit that would stand as an obstacle to the uniformity of federal standards — is distinct from a defense on the merits. To be sure, the defendant manufacturer would be happy to win on any theory. However, the road to a successful defense based on preemption is entirely different, and is more unlikely to be found, than that to a defense on the merits. The latter is much broader — the manufacturer just claims compliance with a standard, and argues that compliance proves that the car could not have been defectively designed. To prove preemption, on the other hand, the manufacturer must show 1) that the theory of recovery advanced by the product liability suit is directed at the same "aspect of performance," as that term is narrowly defined in *Chrysler Corp.* v. *Rhodes,* 416 F.2d 319 (lst Cir. 1969), as the federal safety standard, and 2) that the theory of recovery is of sufficiently general applicability that a successful tort suit would be equivalent to a state regulation.

We cannot say whether implied preemption would have been a viable defense in any of the cited cases where FMVSS were invoked as a defense on the merits. However, we do not think it coincidental that defendants first raised, and courts have first accepted, the preemption argument in the unusual context of an air bag suit. Air bags suits are peculiarly well suited to implied preemption. First, as discussed in Section IVC above, the applicable federal regulation has moved beyond a pure performance standard toward a design standard. Product liability actions based on a theory of defective design have a much greater potential to conflict with a *design-type* standard because such an action will allege that some specific aspect of the vehicle's design was defective. Defective design actions will not ordinarily allege that a vehicle should be manufactured to meet some hypothetical performance standard. Second, air bag suits are of the broadest general applicability — potentially affecting every

vehicle on the road —and thus are most similar to a state regulation.

However, regardless of the applicability of implied preemption to the defense on the merits cases cited by plaintiff, these cases are not controlling as the issue of implied preemption was never argued or addressed.

E. ***Agency Capture***

In contrast to our reading of the conflicting preemption and savings clauses, plaintiff argues that the two provisions embody Congress's well thought out intent that the Safety Act would create a dual system of regulating automobile safety, where *both* state courts and a federal agency would be free to extend the standards of care of the safe design of automobiles. We find this argument utterly lacking in historic or statutory support. However, we address it fully because the policy implications of the argument have undoubted appeal, and may have influenced the district court.

Congress, plaintiff argues, believed that *two* institutions — both state courts and a federal agency — were required because the federal agency would be subject to "capture" by the automotive industry. "Agency capture," as explained by legal scholars, is the undesirable scenario where the regulated industry gains influence over the regulators, and the regulators end up serving the interests of the industry, rather than the general public. *See generally* Wiley, *A Capture Theory of Antitrust Federalism.* 99 Harv. L. Rev. 713, 724-26 (1986); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1684-87, 1713-15 (1975). This theory was applied to the Safety Act's savings clause in a 1967 article co-authored by Ralph Nader:

> While there is much to be said for consistency and uniformity, achieving these ends by making the agency the sole and ultimate arbiter of design

> standards ignores the political aspect of design decisions. When the standard-setting function is centered exclusively in a single agency, that agency becomes the sole target for outside pressures. There is only one battle to be won. The considerable power of the automobile industry, brought to bear on the agency, will inevitably affect the standard-setting process. Therefore, a decentralization of the decision-making function allows the creation of countervailing pressures which can support or prod the agency. This is perhaps what Congress intended to be the thrust of section [1397(c)].

Nader & Page, *Automobile Design and the Judicial Process,* 55 Calif. L. Rev. 645, 676 (1967). Several explanations are advanced for the considerable influence which industries can exert on their regulators, including the following which, arguably, could apply to NHTSA and the automotive industry.

> The division of responsibility between the regulated firms, which retain primary control over their own affairs, and the administrator, whose power is essentially negative and who is dependent on industry cooperation in order to achieve his objectives, places the administrator in an inherently weak position. The administrator will, nonetheless, be held responsible if the industry suffers serious economic dislocation. For both of these reasons he may pursue conservative policies.

Stewart, *The Reformation of American Administrative Law*, 99 Harv. L. Rev. at 1685. The district court, in fact, seemed influenced by the "agency capture" argument — at the hearing on the motion for summary judgment, the court stated

> If the [Safety Act] reads the way you [General Motors] say it is, this statute, which is supposed to be a safety statute, is an incredible piece of self-in-

terest legislation on the part of the auto industry, isn't it?

Although plaintiff's "agency capture" argument may have force in the field of public policy, it lacks persuasive force in this case. Our task is to divine the legislative intent behind the preemption and savings clauses, and neither the text nor legislative history of the Safety Act indicate that Congress was concerned with the "capture" of federal regulators by the automobile industry. As noted above, the legislative history of the Safety Act fails to even mention suits for unsafe designs, no less the plaintiff's sophisticated dual system of safety regulation based on state court defective design suits and federal motor vehicle safety standards. When Congress did mention another source of design regulation — state government — it explicitly provided that these institutions would only have a *consultative* role in areas covered by federal standards. We find no indication that Congress intended the dual regulatory scheme which now seems so reasonable to plaintiff.

Furthermore, if Congress intended the savings clause to create this dual system of regulation, plaintiff fails to explain why Congress forbade state agencies from setting standards nonidentical to the federal standards. Although state agencies are also subject to "agency capture," the automobile industry would certainly have more difficulty capturing 50 states than one federal agency. And as state tort law was ineffective in setting design standards prior to 1966, state agencies were the only other source of regulation when the Safety Act was passed in 1966. Thus if Congress really feared agency capture, and wanted a dual system of safety regulation, it would not have preempted state regulation.

V.

We thus answer the question certified on interlocutory appeal that federal law does preempt the Massachusetts product liability claim in question against General Motors based on its installing seat belts rather than air bags in the motor vehicle in which plaintiff was injured.

Remanded for further proceedings not inconsistent herewith.

Dissent follows.

SELYA, *Circuit Judge* (dissenting). My brethren today espouse a vision of preemption that I find needlessly wide and a conception of the common law that seemingly misperceives tort as a regulatory system. What is more, this espousal occurs in an arena fraught with political drama —automobile safety regulation — where we should be especially reluctant to insulate administrative decisions from the prophylaxis of the civil jury, thereby placing common law protections beyond the reach of the motoring public. I am not so naive as to question that Congress may, if it chooses, shield its legislative product from unwanted state-law infringement. Short of that, however, the regulatory schematas of administrative agencies should be no less subject to the full panoply of democratic institutions than are the overt acts of other governmental instrumentalities.

While jury verdicts have an admittedly anecdotal quality, they are a core ingredient of our representative democracy, signifying the considered judgment of citizens forced to confront and define the scope of law in action. Because I can discern neither a clear expression that this tort action has been preempted nor any sufficient reason to imply so drastic a result, I would answer the certified question in the negative and affirm the decision below.

I

We have been asked, in effect, to police the border between two subsections of the National Traffic and Motor Vehicle Safety Act of 1966, specifically 15 U.S.C. § 1392(d) (preempting state automobile safety standards) and 15 U.S.C. § 1397(c) (preserving common law remedies).[24] With respect, the majority does not so much police the border as displace it, claiming more territory for federal exclusivity than the statute warrants.

My colleagues and I are not entirely at odds. I agree with them that "[p]reemption is a matter of congressional intent," *ante* at 15, and that the statute *sub judice* is "facially ambiguous". *Id.* at 16.[25] I depart from their analysis, however, when they purport to resolve that ambiguity with a sojourn through the unknown and the unknowable. I subscribe instead to the Court's teaching that "[t]he essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or

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[24]The pertinent statutory text has been set out in the majority opinion, *ante* at 20-21; it would be pleomastic to repeat it here.

[25]It does strike me as curious, however, that having found such ambiguity, the majority expends little effort in trying to reconcile the perceived conflict. *See ante* at 20-23. Instead, they presume that tort liability in this case would have the same effect as a state safety standard, and then argue that Congress "did not envisage this peculiar type of lawsuit...." *Id.* at 22. This breathtakingly broad approach seems to me to skip the requisite step of analyzing the statute's language. Moreover, it dresses Congress in an oversized set of blinders; logically extended, the majority's methodology would freeze "saved" common law actions in the form they existed, or could be envisioned, at the time an act was passed. I refuse to believe that Congress need "envisage" every twist and turn of evolving common law jurisprud ence in order to shelter tort liability from preemption.

unnecessary anyone else — including the federal judiciary — deems state involvement to be." *Garcia* v. *San Antonio Metropolitan Transit Auth.*. 469 U.S. 528, 546 (1985). I am unwilling to find preemption in a case as charged with ambiguity as this one. *See Maryland* v. *Louisiana,* 451 U.S. 725, 746 (1981); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Rather, I believe, as did the court below that Massachusetts remains free to impose its common law concepts of tort liability in this area.

The point of reasoned beginning in interpreting a law is the language of the statute itself. *United States* v. *James,* 479 U. S. 597, 604 (1986). In construing statutes, our role is to give effect to them as written and as a whole, not to enforce one section at the expense of another. We must "assume that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982). That canon of construction has particular pertinency here, where both the preemption and savings clauses use the word "any." The Supreme Court has recently placed special emphasis on that term, remarking that "[i]t is difficult to imagine broader language." *James,* 479 U.S. at 604 (footnote omitted). Applying its analysis to statutory language dealing with liability, the Court continued: "Congress' choice of the language '*any* damage' and 'liability of *any* kind' further undercuts a narrow construction." *Id.* at 605. (emphasis supplied by the Court).

A savings clause exists as a specific exception to a general preemption clause it is designed to save a specific subset of legal expressions that would otherwise be preempted.[26] Thus, while we are *generally obligated to give a*

[26] One cannot sensibly reverse these roles and read the savings clause as general and the preemption clause as specific. The savings clause, after all, contains the general predicate, "[c]ompliance with *and* Federal motor vehicle safety standard issued under this chapter...." 15 U.S.C. § 1397(c) (emphasis supplied). Section 1392(d) contains a second general

broad construction to the word "any" as used in the preemption clause, we are specifically obligated to give great breadth to its use in the savings clause.

Even if these canons of construction do not, in and of themselves, suggest the proper resolution of the facial ambiguity in the statute — and I believe they do — they at least inform one's reading of the legislative history. The majority concludes that "Congress in 1966 did not contemplate the likelihood that there would be a state tort action that would effectively create a state design standard conflicting with a federal safety standard." *Ante* at 23. In arriving at this point, my confreres first examine the "historical context of the Safety Act's enactment in 1966...." *Id.* at 24. That approach reverses the proper analytic sequence in two ways. For one thing, the legislative history comprises the statements which Congress itself deemed most relevant to statutory understanding. Both legal and historical research techniques suggest that the most relevant materials be analyzed first.[27] *See e.g. Blum* v. *Stenson,* 465 U.S. 886, 896 (1984). It is only if a reviewing court needs enlightenment that "outside" historical sources must be plumbed to illuminate the language of the legislative materials.

The second deviation from the proper norm is more subtle. My brethren radically alter the inquiry's focus by defining the peek into the past in the narrowest conceivable

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predicate, safety standards "in effect" preempting a State from "establish[ing], or ... continuing in effect" non-identical safety standards "applicable to the same aspect of performance" as the federal standard. The savings clause depends for its meaning on the factual predicates of federal safety standards in effect, complied with, and covering the relevant aspect of performance.

[27]The order of reference in *California Federal Savings & Loan Ass'n* v. *Guerra.* 479 U.S. 272, 284 (1987), relied on by the majority, *ante* at 24, seems to me no accident. A court "must examine the [act's] language against the background of its legislative history and historical context". *Id.*

terms *(e.g.,* the historical question deals with "possible preemption of certain defective design actions ... up to 1966," *ante* at 24), unabashedly presuming Congress to have been nescient in the face of the dynamic evolution of tort law. Given the level of generality in both the statutory language and the legislative history — a level of generality which appears conceded, *see ante* at 31 — I think that the better approach is to ask what one means by the general language in the context of legal history circa 1966. That approach grounds the interpretative query in what Congress said, rather than in the "precarious business" of attempting to draw inferences from congressional silence, *Symons* v. *Chrysler Loan Guarantee Board,* 670 F.2d 238, 242 (D.C. Cir. 1981); *see also Capitol Technical Services, Inc.* v. *FAA,* 791 F.2d 964, 971 &n.42 (D.C. Cir. 1986) (same); *cf.* D. Fischer, *Historians' Fallacies* 15-24, 47-48 (1970) (discussing fallacies of fictional question, semantical question, and negative proof).

Try as I might, I can fathom no implicit exception for design defects in the general statements contained in the legislative history.

To the exact contrary, an unbiased glimpse of tort law circa 1966 indicates to me that design defect litigation, although then a relatively recent phenomenon, was not so new as to catch the Congress unawares. Let me illustrate briefly. By 1966, the judiciary had amassed a great deal of experience with design defects in respect to a host of products. When one looks to the intellectual world of tort at that time and seeks to ascertain what was meant by generic references to products liability, the sensible approach is to assume that broad language derives its meaning from the commensurately broad universe of legal practice which informs it. When my colleagues focus on the date of what they term the "seminal decision" in *Larsen* v. *General Motors Corp.,* 391

F.2d 495 (8th Cir. 1968), *ante* at 24, they imply that the liability it imposed for negligent automotive design sprang full-blown from the collective brows of the Eighth Circuit at that moment. But *Larsen* did not emerge *ex nihilo;* the *Larsen* court simply took what seemed the next logical step in the evolution of tort law. *See, e.g., 391 F.2d at 504* (automotive industry not "being singled out for any special adverse treatment; liability for design defects predicated upon established "general negligence principles").

Fairly read, the *Larsen* rationale derived from cases, annotations, legislative materials, and scholarly commentary which, by and large, were available in 1966. Moreover, the decision itself took note of the heavy criticism trailing in the wake of *Evans* v. *General Motors Corp.,* 359 F.2d 822, (7th Cir.), *cert. denied,* 388 U.S. 836 (1966), a pre-Safety Act case holding that an automobile manufacturer could not be held liable for negligence in design. *Larsen.* 391 F.2d at 505 n.9. Even if we accept *arguendo* the majority's isthmian frame of reference, there is a great deal of evidence that when the general words "common law liability" or "products liability" were used in 1966, they could easily have embraced what the *Evans* dissent characterized as a "broad national issue"- automobile design defects. *Evans,* 359 F.2d at 828 (Kiley, J., dissenting). Significantly, Judge Kiley drew attention to the extensive literature then available concerning automobile "safety design and production," *id.,* and noted that the law was clearly pointing "to[ward] greater responsibility of manufacturers in designing ... products...." *Id.* at 826.

Indeed, *Larsen* itself addressed the relationship between NHTSA standards and common law liability with some particularity. Discussing the savings clause, 15 U.S.C. § 1397(c), in the context of a design defect action, the court invoked the general language of common law liability:

> It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability. The common law is not sterile or rigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time. The common law standard of a duty to use reasonable care in light of all the circumstances can at least serve the needs of our society until the legislature imposes higher standards or the courts expand the doctrine of strict liability for tort. The Act is a salutary step in this direction and not an exemption from common law liability.

Larsen, 391 F.2d at 506. While I do not regard the *Larsen* court's discussion of the interplay among products liability, tort, and regulation as dispositive, such expressions, nearly contemporaneous with passage of the Safety Act, are extremely suggestive. At a distance of some twenty years, I fail to see how we can construe the ordinary language of a statute enacted in 1966 better than a court not twenty months distant.

Given that courts both before and closely after the passage of the Safety Act addressed the question of automobile design defects in general terms, I believe we ought to give the legislative history's general language the overall meaning that contemporary courts gave it. This is especially so since Congress could hardly have been blind and deaf to the transformation that tort law had undergone in the preceding decades. Congress made no specific exception for products liability for design defects, and we deserve the proper performance of our role by carving such an exception against the grain of history. At the very least, the usage of the times suggests sufficient ambiguity in legislative

history and historical context to require us to resolve the amphiboly based on the canons of statutory interpretation earlier discussed. *See supra* at 71-72 & n.26. While I am not an historian, I believe that the mood in 1966 was both different and more fluid than my colleagues portray when they selectively scrutinize the history of design defect actions generally[28] and then proceed to conflate that history with developments in the automotive industry.

The history of tort law over the period in question has been the subject of much scholarly attention in recent years. The sum of the relevant scholarship makes me less sanguine than my brethren that Congress, in 1966, was ignorant of the impact of design defect actions. The general consensus seems clear: "Since 1960, our modern civil liability regime has experienced a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system." Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort*

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[28]No useful purpose would be served by overturning every stone upon which the majority's view of the mid-1960s rests. It suffices to say that even the sturdiest of my colleagues' supporting authorities yield interpretations radically at variance with the ones proffered in the opinion. *See. e.g.*. Katz, *Liability of Automobile Manufacturers For Unsafe Design of Passenger Cars*, 69 Harv. L. Rev. 863, 863 n.5 (1956) (noting that, although "[t]here is a deadth of reported cases where negligence in design was urged by plaintiff as a basis for liability,... *the successful instances appear to be recent...*;" the portion which I have underlined plainly suggests a nascent trend which the panel majority inexplicably discounts); Nader and Page, *Automobile Design and the Judicial Process*, 55 Cal. L. Rev. 645, 645 nn. 3,4 (1967) (recognizing that design defect actions in the automotive industry were, by 1966, at least occasionally settled and not infrequently successful at the trial level); *id.* at 669-70 (concluding that inclusion of standards in the Safety Act will spur design defect actions, inasmuch as "[t]he reluctance of the courts to recognize these safety values should vanish, now that they are embodied in statute and regulation"); *id.* at 674 (concluding that prospective design liability "played some role" in passage of the 1966 Safety Act).

Law, 15 J. Leg. Stud. 461, 461 (1985); G. White, *Tort Law in America: An Intellectual History* 168-73, 197-208 (1980) (similar). In Professor Priest's view, product defect claims, based on the theory that an enterprise should internalize the costs of accidents resulting from failings in its wares, were fully "synthesized" and generally accepted by 1965. Priest, *op. cit. supra,* at 505-18. And by then, although the definition of defective design was not firmly established, the commentators had begun to urge, and some courts had begun to adopt, expansive definitions. *Id.* at 521-23; *see also* Noel, *Recent Trends in Manufacturer's Negligence as to Design, Instructions or Warnings,* 19 Sw.L.J. 43, 47-48 51-60 (1965); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 Yale L.J. 816 (1962). The evolving scholarship itself acted as a stimulus for rapid doctrinal change in the area of products liability. *See* White, *op. cit. supra.,* at 168. The Safety Act was passed in the midst of just such turbulent change. Had Congress wanted to separate the spheres of common law and federal regulation completely, it knew how to do so. It chose instead repeatedly to use the general language of tort, fashioning no such clear dichotomy as my colleagues now divine. The statutory framework, the language of the Act, the historical antecedents which pertain, and the tenor of the legal times coalesce to convince me that Congress, when enacting this law, did not intend to restrict the evolution of tort, much less to restrict it by way of preemption.

II

Notwithstanding that the savings clause deserves fuller effect, it can still be preempted if the cause of action which plaintiffs endeavor to assert "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind* v. *ANR Pipeline Co.,* 108 S. Ct. 1145,

1151 (1988); *see also San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 247 (1959); *Palmer v. Liggett Group. Inc.,* 825 F.2d 620, 626 (lst Cir. 1987). Yet, mindful that the savings clause must, for the reasons stated in Part I hereof, preserve the widest possible range of causes of action not in conflict with the safety standard, I believe the plaintiff's complaint passes muster.

Let me start this segment of the analysis by noting my frank disagreement with the majority when it professes to see no difference between direct regulation and the indirect regulatory effect of tort law vis-a-vis this case. *See ante* at 40-51. While I have no wish to indulge — let alone sponsor — an arid jurisprudential debate, I think there is a meaningful distinction. Direct regulation comprises a set of commands which all must obey, and thereby overrides both economic and noneconomic considerations. Tort law regulates not by obligation, but by suasion; though it lacks the power to command behavioral modifications, it affects the economics of production and consumption, thereby acquiring considerable persuasive impact. The spectre of potential tort liability forces a firm to choose how best to respond to liability costs and, depending upon market conditions, how to allocate those costs among consumers and shareholders. Put another way, compliance with a course of action mandated by actual regulation is a given; compliance with a course of action suggested by the spectre of tort liability, or not, is a choice constrained by economic factors.

In that sense, tort operates to change the background costs of the manufacturer's design decisions. And, the resultant choice — say, to install airbags or forgo them is not a pure one — for one choice, for *all* background costs, not just tort liability, influence design decisions. So viewed, every election which a manufacturer makes among the options

available under the safety standard is governed by a variegated economic mix.

Because a manufacturer's choice is in this sense never a "free" choice, the analogy which the majority draws to the colorful rhetoric of *Palmer* seems badly skewed.[29] *Palmer* was a cigarette warning case where, absent preemption, defendant would have been faced with a Hobson's choice: it could avoid future liability only by adding a new warning label, one not within the prescription of 15 U.S.C. § 1333. This case does not pose that sort of dilemma for General Motors. Here, defendant can avoid liability by choosing an option which NHTSA (and even Congress, *see Pacific Legal Foundation* v. *Dept of Transportation*, 593 F.2d 1338, 1342 n. 29 (D.C. Cir.) (Congress did not exercise its option to veto gradual introduction of passive restraints, including airbags) *cert. denied*, 444 U.S. 830 (1979)), has approved. Unlike cigarette warnings — where the labels required would have "contravene[d] the Act's policy of uniform labelings," 825 F.2d at 627 — the statute here in play provides only for "minimum" safety standards. *See* 15 U.S.C. § 1391(2). I fully agree that any state holding that covered the same aspect of performance as the safety standard in question *and* that would have the effect of requiring something other than a permitted statutory option would — and should — be preempted as non-identical. But that is some other case — not this one. As the majority concedes, "the standards are 'minimum' in the sense that a manufacturer may make a vehicle safer than required by federal law...." *Ante* at 52. The instant case is thus at a sizable remove from *Palmer*. Absolutely no conflict exists between federal law and state tort law when the latter allows for the imposition of damages; the

[29]The exact statement bears repeating. My colleagues argue that, if plaintiffs could pursue this suit, "General Motors' choice to avoid modification of its design seems akin to 'the free choice of coming up for air after being underwater.' *Palmar*, 825 F.2d at 627." *Ante* at 43.

economic calculus changes, to be sure — but the change does little more than counsel that the wiser course for the manufacturer may be to alter or expand its selection among the choices legitimately available to it.

Perhaps the root cause of my fellow panelists' objection to allowing a suit like this one to go forward is the concern that different juries in different locales may choose differently among the statutory options, see *ante* at 12-14, thus "requiring" a manufacturer to implement all three of the permissible safety systems. This, it is intimated, would frustrate NHTSA's apparent purpose of providing manufacturers a choice. But that objection is something of a heuristic. In the first place, NHTSA's method must be in service to the aim of the statute. In the second place, the contention that variation in verdicts would destroy uniformity holds very little water. And finally, the effect of requiring any particular option may be such as to allow a manufacturer to absorb or pass along liability costs from suits based on lack of the remaining options. Let me amplify on these three lines of response.

1. *Aim of the Statute.* In line with the enabling legislation itself, NHTSA's decision to allow manufacturers to exercise an option must be designed to save lives and reduce injuries. The regulation itself tells the tale:

> The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries ... by specifying equipment requirements for active and passive restraint systems.

49 C.F.R. § 571.208 (1976). One searches in vain for anything in the statute or the standard intimating that the provision of choice to the manufacturer is an "objective of federal law." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). If no such objective can be discerned, then *a fortiori*, the statute cannot be frustrated by allowing state tort

laws to operate. Given that the option is simply in service to the statutory and regulatory objective actually stated, that is, safety, I can perceive no irreconcilable conflict which would stem from court decisions in cases like this one. Damage suits will tend to encourage safety, not countervail it. Adjudications adverse to manufacturers would likely have the effect of implementing the safety standard in toto.

Texas & Pacific Ry Co. v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907), is not to the contrary. *Abilene* arose out of a scenario wherein the Interstate Commerce Commission had been empowered to set "reasonable" freight rates and railroads were required to charge accordingly. *Id.* at 437-38. To allow juries to find other rates "reasonable" would have resulted in the "absolute destruction of the act." *Id.* at 440. But in the case at bar, unlike in *Abilene,* the suggested tort action is not "wholly inconsistent with the administrative power." *Id.* at 441. As I have pointed out, all three options contained in FMVSS 208 are statutorily and administratively legitimate and, as the majority concedes, *ante* at 52, could be utilized coactively by defendant if it chose to do so.

I am also unpersuaded that *International Paper* v. *Ouellette,* 479 U.S. 481 (1987), compels the majority's result. *Ouellette* is dependent upon the wording of the idiosyncratic savings clause there at issue and presents, at bottom, a question of *which* state-law actions survive in the face of federal regulation — not a question of *whether* any state-law actions survive at all. Not only did the *Ouellette* Court act to preserve certain state-law claims, but it also decreed Vermont law preempted solely because its application would "allow respondents to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the [Clean Water] Act." *Id.* at 494. In this case, General Motors cannot so facilely escape the administrative scheme; all of its choices stem

from acceptable options.The interest balance — public/private — remains unaffected. Under the Clean Water Act, after all, a state was given the right to exceed federal standards for pollution sources within its jurisdiction. *Id.* at 489-90. Under the Safety Act, the states lack even that power; the sovereignty of each state, the implicit concern of the *Ouellette* Court, *id.* at 495, remains uncompromised by validating the tort law of Massachusetts.

2. *Uniformity*. I find my colleagues' fear that maintenance of this action will destroy uniformity, *see, e.g., ante* at 31-32, 46-50, to be unfounded. They point to nothing in the voluminous record which so much as suggests that installation of any one or more of the proffered options makes installation of any of the others impossible. Unless a manufacturer wilfully attempted to engineer different modes of compliance for each jurisdiction, an act which would be tantamount to economic self-immolation, nothing about the "centralized, mass production, high volume character" of the industry...," *ante* at 47 (citation omitted), would be compromised. A manufacturer would never be in the position of having to implement contradictory safety features, nor could it ever be faced with one state's safety "maximum" and another's conflicting "minimum." In no meaningful sense would uniformity be threatened; in the worst-case scenario — "worst" from the manufacturer's viewpoint — self-interest would require either concurrent implementation of the FMVSS 208 options or payment of whatever damage awards (if any) might accrue. Such a result does not create an irreconcilable conflict between the federal regulatory scheme and state common law. *See Wood* v. *General Motors Corp.*, 673 F. Supp. 1108, 1114-16 (D. Mass. 1987) (explaining why potential for damage award under state law is not incompatible with FMVSS 208; citing relevant authority).

3. *Cost Considerations.* In the last analysis, the likelihood that all three options could ever be required, in the sense that tort law ever "requires" anything to be done, seems remote. The synergy inherent in, for example, adding airbags to an automobile that already has manual belts with warning systems, would likely be enormous. Under such circumstances, neglect to furnish the incremental protection of the additional (third) option might well yield such small liability losses that manufacturers could logically rate the game as eminently worth the candle. This assertion, to be sure, has a speculative quality. But that, perhaps, is the point: it is no less problematic than the chain of conjectural inferences put together by my colleagues to the effect that a contrary decision (1) will open the door to statelaw claims, which (2) will be realized in this and countless other actions, (3) yielding damage rewards so large as to force car manufacturers to alter their behavior.[30]

III

There is perhaps, one other observation which should be made. The majority apparently agrees that "compliance with a federal safety standard does not serve as a defense on the *merits* of a defective design claim." *Ante* at 61 (emphasis in original). Yet the abundant caselaw supporting that proposition cannot be reconciled with this court's opinion today. If compliance is not a defense on the merits, then almost by definition, a successful common law action for inadequate design could force manufacturers to go beyond

[30]With respect, my brethren's approach involves other large chunks of surmise as well, assuming, for instance, that a decision in regard to a 1976 Blazer will be applicable to every car of every make of every year, and that "passive restraints" within the meaning of plaintiffs' claim in this case will necessarily involve airbags rather than the less expensive belt system.

the safety standards in place under any imaginable federal law. The effect, therefore, would be the same as requiring a non-identical standard covering the same aspect of performance. It would be a strange "savings clause" indeed which could salvage an action on the merits in this fashion but be impuissant to step preemption, when the effect on uniformity of regulation and manufacture would be precisely the same in either case. *Cf. Dawson* v. *Chrysler Corp.*, 630 F.2d 950, 953 (3d Cir. 1980) (holding that compliance with NHTSA safety standards does not relieve an automobile manufacturer of liability and noting "the troubling public policy dilemma ... that under existing federal law individual juries in the various states are permitted, in effect, to establish national automobile safety standards"), *cert. denied, 450 U.S. 959 (1981).*

IV

I need go no further. I recognize the closeness of the question and the imprecisions of the statutory scheme. I understand full well that the balance of policy considerations may have altered since the Safety Act of 1966 was passed. And it can, I suppose, be hypothesized that automobile safety is not today the pressing concern it was in 1966 (although that is not a theorem to which I can willingly subscribe). But the crux of the matter is not whether the majority's vision may best serve an era in which the regulated are free both to choose safety options which exempt them from the imposed wisdom of juries under the common law and to safeguard their profit margins wherever Congress's speech is less than explicit. What counts, I suggest, is that Congress did not originally, and has yet to, superimpose that entrepreneurial vision on the Safety Act. Nor do I understand the safety standard promulgated by NHTSA to have done so. Because of those parallel truths, I would affirm the

district court and allow this suit to proceed. The plaintiff's cause of action in tort, held by the trial judge to state a viable claim under the common law of Massachusetts, 673 F. Supp. at 1120, is not preempted.[31]

I respectfully dissent.

[31] The question of whether or not the plaintiff's complaint, preemption aside, adequately limns a state-law claim upon which relief can be granted is not presently before us, and in dissenting, I take no view of that question.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PATRICIA M. WOOD,	)	
FRANCIS X. WOOD, and	)	
ELIZABETH WOOD,	)	
Plaintiffs,	)	
	)	CIVIL ACTION
	)	NO. 84-1566-Y
v.	)	
GENERAL MOTORS CORPORATION,	)	
Defendant.	)	

MEMORANDUM OF DECISION ON THE MOTIONS OF THE DEFENDANT TO DISMISS AND FOR SUMMARY JUDGMENT

YOUNG, D.J. May 8, 1987

The plaintiffs Francis and Elizabeth Wood and their daughter Patricia initiated this diversity action after Patricia Wood suffered severe injuries as a result of an accident in an automobile manufactured by the defendant General Motors Corporation ("General Motors").

I.

For the purposes of addressing the present motions to dismiss and for summary judgment, the facts are straight-forward and essentially undisputed. On May 19, 1981, Patricia Wood was on her way home from school, riding as a passenger in a 1976 General Motors Blazer. Wood was seated,

apparently unbelted, in the front seat. The vehicle, while travelling in excess of thirty miles per hour, collided head on into a roadside tree. Wood suffered a broken neck and was rendered quadriplegic. On May 18, 1984, she and her parents commenced this action.

The Woods' products liability action alleges that General Motors' automobile was, when manufactured and released from the factory, in a defective condition and unreasonably dangerous to the user. The Woods' theory is that General Motors' failure to install a passive restraint system, specifically the failure to equip the automobile with air bags or automatic seatbelts, rendered the car defective and this defect caused the Woods to suffer their injuries. The Woods claim that their injuries are due to General Motors' negligence, breach of the implied warranty of merchantability, Mass. Gen. Laws ch. 106, § 2-314(2)(c), and conduct in violation of Mass. Gen. Laws ch. 93A, §§ 2 and 9. Moreover, Francis and Elizabeth Wood both claim injuries based upon a loss of consortium theory. [1]

General Motors has filed a motion for summary judgment on the negligence, breach of warranty, and chapter 93A claims and a motion to dismiss the loss of consortium claim. General Motors contends that its summary judgment motion should be granted because the Woods' claims are preempted by the National Traffic and Motor Vehicle Safety Act ("Safety Act"), 15 U.S.C. §§ 1381-1420 (1982 & Supp. 1987) and the regulations promulgated thereunder. General Motors also contends that the tort law of Massachusetts

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[1]This Court has previously dismissed their claim for the negligent infliction of emotional distress. For an excellent, nation-wide synthesis of the evolving law in this area, see S . Plotkin, *The Evolution of Tort Liability for Psychic Injuries: A Proposal to Protect Relational Interests* (1986) (unpublished thesis on file at the University of Virginia School of Law).

recognizes neither the claim that the lack of passive restraint systems can render a motor vehicle unreasonably dangerous nor, in the circumstances of this case, the claim for loss of consortium. There is considerable thoughtful support for General Motors' position on the preemption issue,[2] no specific Massachusetts guidance on the issue whether breach of warranty can be premised on the absence of passive restraints, and scant and contradictory lower court precedent concerning the recognition of a claim for loss of consortium in these circumstances. [3] Even so, after careful

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[2]*Wuttelet* v. *Toyota Motor Corp.*, No. CV-85-054-GF, slip op. (D. Mont. April 27, 1987)(order of court); *Doty* v. *McMahon*, No. 85-3591, slip op. (D.D.C. Feb. 4, 1987); *Hughes* v. *Ford Motor Co.*, No. 84-1049, slip op. (D. Conn. Jan. 5, 1987) (adopting Magistrate's ruling that decided issue on Connecticut state tort law grounds); *Baird* v. *General Motors Corp.*, No. 84-2874A, slip op. (N.D. Ohio Oct. 31, 1986); *Cox* v. *Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover* v. *Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Wickstrom* v. *Maplewood Toyota, Inc.*, No. 470771, slip op. (Minn. D. Ct. March 12, 1987). *But see Murphy* v. *Nissan Motor Corp.*, No. 84-4556, slip op. (E.D.N.Y. Jan. 7, 1987) (claim for defectively designed product on theory that seatbelts were ineffective when used in a reclining position where there are no additional safety features such as airbags); *see also* Note, *Air Bag Litigation: Plaintiffs, Start Your Engines*, 13 Pepperdine L. Rev. 1063, 1074 (1986) (reasoning in a conclusory manner that compliance with the Administrator's safety standards does not exempt a manufacturer from state tort law liability for failing to install an air bag system).

[3]*Compare Prince-Jackson* v. *Children's Hospital Medical Center*, No. 72769 (Mass. Superior Ct. April 8, 1985)(Young, J.)(opinion recognizing a parent' s right at common law to sue for loss of consortium arising out of injuries to a minor child) *with Schebel* v. *General Motors Corp.*, No. 85-1574 (Mass. Superior Ct. June 25, 1986)(Murphy , J .)(order granting summary judgment against such a claim). *See Rogers* v. *Baker Industries*, No. 86-0395-MA, slip op. (D. Mass. August 20, 1986)(concluding, without reference to the decisions of the Massachusetts Superior Court, that the Massachusetts Supreme Judicial Court, when it comes to address the issue, will not recognize such a claim).

reflection this Court concludes that General Motors' motion ought be denied and the case ought stand for trial.

II.

THE SAFETY ACT

Congress established the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381 -1420 (1966), in response to the "soaring rate of death and debilitation on the Nation's highways." S. Rep. No. 1301, 89th Cong. 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News, 2709, 2709 (hereinafter S. Rep. No. 1301). Section 1381, the Congressional declaration of purpose, declares that the "purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381 (1982). The legislation places the "primary responsibility" for establishing safety standards on the federal government. The role of the states in the motor vehicle safety regulatory scheme is set forth in § 1392(d):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety

> requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

Thus, states are not preempted from enforcing safety standards identical to federal standards. In essence, the states' regulations should complement the federal regulatory scheme. S. Rep. No. 505, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Ad. News, 3169, 3174. Not only do states have the authority to establish identical regulations, but also they may regulate on "aspects of performance" not specifically established by the federal government. *Chrysler Corp.* v. *Rhodes*, 416 F.2d 319 (1st Cir. 1969)(where federal regulations did not deal with specific feature of safety lamp, states may regulate area). It is only when a federal standard deals with a specific "aspect of performance" of a vehicle or item of equipment that nonidentical state regulations are precluded. *Id.* at 325. Finally, Congress explicitly intended to retain state tort remedies. It enacted a "savings clause," § 1397(c), which provides that "[c]ompliance with any federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

Congress implemented the motor vehicle safety standard plan by directing the Secretary of Transportation to establish federal standards. 15 U.S.C. § 1392(a). The Secretary delegated this authority to the Administrator of the National Highway Traffic Safety Administration ("Administrator").[4] Pursuant to this authority, the Administrator

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[4]This opinion uses the word "Administrator" generally to refer to the Administrator himself and also to the National Highway Traffic Safety Administration, its predecessor, the National Highway Traffic Safety Bureau, the Department of Transportation, and the Secretary of Transportation.

issued Federal Motor Vehicle Safety Standard 208 ("Standard 208"), entitled "Occupant Crash Protection."

Standard 208 "bears a complex and convoluted history." *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 35 (1983). As originally issued in 1967, Standard 208 required only the installation of seatbelts. 32 Fed. Reg. 2408, 2415 (1967). Due to the low levels of seatbelt usage, the Administrator amended Standard 208 in 1970 to include passive restraint requirements. 34 Fed. Reg. 11,148 (1969). The two forms of passive restraints considered were "passive seat-belts" and airbags. Passive or automatic seatbelts are fastened to the interior of the door and deploy automatically when the door is closed by attaching to the car floor. Airbags are inflatable devices concealed in the dashboard and steering column that inflate automatically when a sensor indicates that the "deceleration forces from an accident have exceeded a preset minimum." *State Farm* , 463 U.S. at 35. In 1972, Standard 208 was amended to require the gradual phasing in of passive protection for all cars. For models made before August 1975, manufacturers were permitted to use manual belts with a warning or an "ignition interlock" system,[5] which prevented a car from starting until the belts were fastened. For models made after August 1975, the rule did not "dictate any particular form of passive protection, [but] ... established minimum criteria that cars would have to meet." *Pacific Legal Foundation* v. *Department of Transportation*, 593 F.2d 1338, 1341 (D.C. Cir.) *cert. denied*, 444 U.S.

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[5]The ignition interlock system was prohibited by Congress in 1974 in an amendment to the Safety Act that also provided that any future safety standards other than seatbelts would have to be submitted to Congress where they would be subject to legislative veto. 15 U.S.C. § 1410(b). The legislative veto provision is apparently unconstitutional in light of *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983).

830 (1979). In 1975, the imposition of the mandatory passive restraint system was postponed until August, 1976. 40 Fed. Reg. 16,217 (1975).

Then, in June, 1976, the Secretary of Transportation suspended the passive restraint requirement and extended the optional alternatives indefinitely.[6] The Secretary feared public hostility against the new systems *State Farm*, 463 U.S. at 37 (citing Secretary Coleman's Decision of Dec. 6, 1976). The Secretary's successor disagreed and reimposed the mandatory requirement four months later.42 Fed. Reg. 34,289 (1976). The new standard mandated the phasing in of passive restraints between 1982 and 1984. The standard was submitted to Congress in accordance with 15 U.S.C. § 1410(b), where no action was taken. S. Rep. No. 481, 95th Cong., 1st Sess. (1977) (the Senate Committee on Commerce, Science, and Transportation held four days of hearings and issued a report endorsing the standard).

In 1981, the Administrator rescinded the passive restraint requirements. The Supreme Court, in *State Farm*, held that the rescission was arbitrary and capricious and remanded the matter to the Administrator for further consideration. *State Farm*, 463 U.S. at 57. In response, the Administrator reimposed the passive restraint requirement with phasing-in to begin on September 1, 1986 and becoming mandatory by September 1, 1989 unless states with populations aggregating two thirds of the nation's total population pass mandatory seatbelt use laws by April, 1989. 49 Fed. Reg. 28,962, 28,963 (1984). A recent challenge to the Administrator's decision was judged not ripe by the United States Court of Appeals for the District of Columbia. *State*

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[6]General Motors, through the affidavit of Jeffrey L. Pearson, states that the 1976 Blazer in question was assembled in August, 1976, making the optional alternative regulations those applicable at the time of manufacture.

Farm Mutual Automobile Insurance Co. v. *Dole*, 802 F. 2d 474 (D.C. Cir. 1986), *cert. denied*, *New York* v. *Dole*, 55 U.S.L.W. 3661 (U.S. March 31, 1987).

The options provided by Standard 208 in August, 1976 are nearly identical to those applicable today. Standard 208 provides that manufacturers may comply by utilizing one of several options. See 49 C.F.R. § 571.208 (1985).[7] For automobiles manufactured during the relevant time period for this litigation, a manufacturer may comply by providing a complete passive protection system, a head-on protection system, or a lap and shoulder protection system. *Id.* § 571.208-S4.1.2. Simplified, the first option requires full air bag protection; the second option requires only frontal air bag protection; and the third option requires protection of the occupant by a lap and shoulder belt apparatus *Id.*

General Motors chose to comply with Standard 208 by implementing the third option. Wood contends that the 1976 Blazer was unreasonably dangerous and defective because it was not equipped with a passive restraint system, either under option one, two, or some other comparable design. General Motors argues that it complied with a federal safety standard option that preempts any state regulation on the same aspect of performance, and that a judgment of liability in tort for failure to provide air bags would, according to General Motors, effectively impose a nonidentical safety standard in contravention of the intention of Congress as expressed in 15 U.S.C. § 1392(d).

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[7]General Motors' 1976 Blazer, a multipurpose passenger vehicle manufactured between January 1, 1976 and August 14, 1977, having a gross vehicle weight rating of 10,000 pounds or less, is covered by 49 C.F.R. § 571.208 - S4.2.2. (1985). The regulations applicable to the 1976 Blazer have remained essentially unchanged although the requirements for the first option, S4.1.2.1., have been amended with respect to complete automatic protection systems. This minor change is irrelevant for the purpose of preemption analysis.

III.

PREEMPTION

Federal law may preempt state law in several ways. First, Congress may include express preemption language in the statute. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, if express preemption language is absent, Congress may nonetheless imply preemption by evidencing an intent to "occupy a given field" thereby precluding any state law within that field. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Congress' intent to occupy a field can be determined by the pervasiveness of the federal scheme, the dominance of the federal interest, or the objectives of the federal law. *Id.*; *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141 (1982); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).[8] Third, where Congress has not entirely superceded state regulation in a specific area, "state law is still preempted to the extent it actually conflicts with federal law." *Silkwood*, 464 U.S. at 248. Actual conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963), or "where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248 (citing *Hines* v. *Davidowitz*, 312 U.S. 52, 67 [1941]). *See generally Massachusetts Medical Society* v. *Dukakis*, No. 86-1575, slip op. at 3-6 (1st Cir. March 30, 1987).

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[8]General Motors has indicated in its brief that this form of preemption is not relevant to the Safety Act. Given that Congress expressly permitted identical regulation, 15 U.S.C. § 1392(d), and that states may regulate areas not specifically addressed by Congress, *see Chrysler Corp.* v. *Rhodes*, 416 F.2d 319 (1st Cir. 1969), it is apparent that Congress did not intend to occupy the entire field of motor vehicle safety.

Before applying these principles, this Court notes that federal regulations have the same preemptive effect as federal statutes. *De La Cuesta*, 458 U.S. at 153 (Assuming the regulatory agency did not exceed its authority, "[f]ederal regulations have no less pre-emptive effect than federal statutes.").[9] Also, when deciding whether Congress intended to preempt state law, this Court must be mindful of the presumption that "Congress did not intend to displace state law," *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981), and that it should not disturb unnecessarily the federal-state balance. *Palmer* v. *Liggett Group, Inc.*, 633 F. Supp. 1171, 1173 (D. Mass. 1986)(citing *Maryland* v. *Louisiana*).

A. Express Preemption

General Motors argues that § 1392(d) expressly preempts "implicit regulation" based upon theories of common law liability such as that asserted in the instant case by the Woods. The language of § 1392(d) does not compel giving such a broad sweep to the concept of regulation by means of safety standards. It states that "no States ... shall have the authority ... to establish ... any safety standards applicable to the same aspect of performance of such vehicle ... not identical to the Federal standard." Federal motor vehicle safety standards are minimum standards for motor vehicle performance. 15 U.S.C. § 1391(2). The federal standards are established by a regulatory agency, subject to judicial review. Noncompliance with the federal safety standards constitutes a violation punishable by civil penalties

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[9]In prescribing any standards under the Safety Act, the Administrator must consider whether the proposed standard is reasonable, practicable, appropriate, and whether it will contribute to carrying out the purposes of the Act. 15 U.S.C. § 1392(f). The Woods do not assert that the Administrator exceeded his authority or that he in any way flouted the statutory guidelines. *Cf. State Farm*, 463 U.S. 29 (1983) (holding that the Administrator acted capriciously and arbitrarily).

and the imposition of injunctive relief. 15 U.S.C. §§ 1392, 1394, 1398-99. Noncompliance with federal safety standards prior to sale by a dealer also subjects the manufacturer to the duty of repurchasing the vehicle or replacing the parts not in compliance with appropriate equipment. 15 U.S.C. § 1400. An award of common law damages does not invoke this panopoly of sanctions and prohibitions. Rather, it is aimed at compensating a victim injured by tortious conduct. The manufacturer need not alter its future conduct but instead may choose only to compensate the individual victim. This is not the situation with a violation of the Safety Act. In the case of noncompliance, the manufacturer *must* repurchase the vehicle or, at its own expense, furnish conforming replacement parts. [10]

Finally, the argument in favor of express preemption is severely undercut by § 1397(c), the savings clause of the Safety Act, which explicitly provides for the continuation of common law liability: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." The statutory preemptive language of § 1392(d) does not directly address state common law. *Cf. Cippollone* v. *Liggett Group, Inc.*, 789 F.2d 181, 185 (3d Cir. 1986)(failure of preemptive language in federal Cigarette Labelling and Advertising Act to include a reference to state common law claims militated against express preemption), *cert. denied*, 55 U.S.L.W. 3474 (Jan. 13, 1987); *Ferebee* v. *Chevron Chemical Co.*, 736 F.2d 1529, 1542-43 (D.C. Cir.)(same construction

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[10] General Motors contends, nonetheless, that this Court should conclude that the Safety Act expressly preempts any putative award because it will have *some* regulatory impact on its conduct. This argument is better conceptually understood as one calling for implied preemption and is addressed therefore in that portion of this opinion. *See infra* § B.2, pp. 18-26.

applied to Federal Insecticide, Fungicide, and Rodenticide Act preemption claim), *cert. denied*, 469 U.S. 1062 (1984). Congress well knows how to expressly bar common law suits when it so desires. *See, e.g.*, Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, 1144(a)(c)(1)(1985)(chapter supercedes all state laws including "laws, *decisions*, rules, regulations, or other State action having the effect of law")(emphasis added). The failure of this express exclusion combined with the existence of the savings clause and the presumption against preemption leads this Court to conclude that there is no express preemption here. *Baird* v. *General Motors Corp.*, No. C84-2874A, slip op. (N.D. Ohio Oct. 31, 1986).[11]

B. Implied Preemption

Implied preemption based upon a conflict analysis is a two-part inquiry. Under the first prong, General Motors apparently argues that if it complies fully with federal Standard 208 and is nevertheless subjected to a state damage award because it did not pursue some other option favored by a jury, an "irreconcilable conflict" is produced, making it physically impossible to comply with both federal and state standards. Under the second prong, General Motors argues that the imposition of a state standard by way of a damages award would frustrate the objectives of the federal law. The Court addresses each argument in turn.

1. Impossibility

The inquiry under this prong is "whether there exists an *irreconcilable* conflict between the federal and state

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[11] *Vanover* v. *Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986) held that § 1392(d) did, in fact, expressly preempt state tort law liability in this area but the *Vanover* court made no reference to the savings clause and its discussion of the "regulatory impact" of a common law claim is better addressed as an implied preemption claim. *See infra* § B.2, pp. 18-26.

regulatory schemes. The existence of a *hypothetical* or *potential* conflict is insufficient to warrant the pre-emption of a statute." *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982)(In applying general preemption principles to antitrust law, the Supreme Court stated that "[a] party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy")(emphasis added). The type of physical impossibility rising to the level of irreconcilable conflict is often presented where dual compliance with federal and state regulations cannot be legally achieved. In *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 143 (1963), a seminal case on conflict analysis, the Supreme Court gave an example of physical impossibility: "[I]f, for example, the federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content," then physically impossible dual compliance would be presented.

General Motors contends that the imposition of common law liability would have the practical effect of eliminating its federally guaranteed options in occupant crashworthy restraint systems. Although such an imposition would not appear to create an "irreconcilable conflict" whereby dual compliance is "physically impossible," General Motors nonetheless argues that the imposition of such an award would produce a conflict forbidden by the Supreme Court's holding in *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141 (1982). The Supreme Court, in *De La Cuesta*, specifically stated, however, that compliance with one of several options provided under the federal regulations and also with the state common law rule "may not be" a physical impossibility. *Id.* at 155. In *De La Cuesta*, the Supreme Court did not find preemption under the *Avocado Growers* impossibility test but rather under the second prong

of the conflict analysis. *See, e.g., Hines* v. *Davidowitz*, 312 U.S. at 67 (a state statute is pre-empted if it creates an "obstacle to the accomplishment and execution of the full purposes and objectives" of Congress). In any event, General Motors' argument directed to the physical impossibility of compliance is unavailing in light of the Supreme Court's holding and reasoning in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984).

Prior to deciding *Silkwood*, the Supreme Court, in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), had ruled that the nuclear power field was occupied by the federal government and therefore any state regulation was preempted. In *Silkwood*, Kerr-McGee, the defendant and processor of certain nuclear materials including plutonium, was found liable in tort for punitive damages. The Supreme Court noted that Kerr-McGee's plant was covered by the federal nuclear licensing scheme. Kerr-McGee was not found to be in material violation of any of the federal agency's regulations. In fact, it had substantially complied with all the regulations.[12] Nevertheless, the Supreme Court

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[12] *Silkwood* v. *Kerr-McGee Corp.*, 769 F.2d 1451, 1456 (10th Cir. 1985) (on remand from Supreme Court), *cert. denied*, 106 S. Ct. 1947 (1986). Contrary to the assertions of General Motors, Defendant's Supplemental Memorandum in Support of its Motion for Summary Judgment, 2, neither the Supreme Court nor the lower federal courts found any material violation. "[T]he only violations of federal regulations throughout the incident was [Kerr-McGee's] failure to maintain a record of the dates of two urine samples submitted by Ms. Silkwood." 769 F.2d at 1457 (citing *Silkwood*, 104 S. Ct. at 619); Easterbrook, *Foreward: The Court and the Economic Systems*, 98 Harv. L. Rev. 4, 43 (1984)("The NRC concluded that the plant had complied with all pertinent safety requirements; a jury concluded that it had not ...."). In fact, the dissent in *Silkwood* explicitly focused on the lack of violations and the meticulous oversight of the plant by the Nuclear Regulatory Commission (then the Atomic Energy Commission). *Silkwood*, 464 U.S. at 277 (Powell, J., dissenting); *id.* at 262 (Blackmun, J., dissenting).

refused to reverse the state jury award of punitive damages. While recognizing that there was "tension" between Kerr-McGee's compliance with the federal regulations and the imposition of the punitive damage award, the Supreme Court concluded that there was no preemptive conflict. An award of compensatory damages is certainly less onerous than one for punitive damages.[13] The purpose of such awards is foremost to compensate the victim and not to regulate standards of conduct.

Finally, impossibility of compliance arguments are usually founded on the assumption that compliance with one regulation, e.g., the state's, would preclude compliance with the other. Such is simply not the case here. *Ferebee*, 736 F.2d at 1543 (imposition of state award does not mandate a change in defendant's conduct since it may continue to comply with the federal standard and simultaneously pay the damage award); *Palmer*, 633 F. Supp. at 1177 ("The defendants' argument is fatally flawed in equating damage awards with direct regulation.... [D]efendants have a choice in deciding how to respond to potential or actual tort liability."); *Silkwood*, 464 U.S. at 264 (Blackmun, J., dissenting)("Whatever compensation standard a State imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. This presumably is what Congress had in mind when it preempted state authority to set administrative regulatory standards but left state compensatory schemes intact"). The potential for an award of compensatory damages under state law does not create an irreconcilable conflict with Standard 208. There is no preemption under this prong of the analysis.

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[13]Mr. Justice Powell, dissenting in *Silkwood*, believes such awards present no element of regulation. 464 U.S. at 276 n.3 ("There is no element of regulation when compensatory damages are awarded ....").

2. Frustration of the Safety Act's Objectives

The Court approaches this second prong in the conflict analysis mindful of the Supreme Court's admonition that "courts should not assume the role which our system assigns to Congress." *Pacific Gas & Electric*, 461 U.S. at 223 (footnote omitted).

Deciding whether a state statute, or in this case, a state judgment finding tort liability, frustrates the full purposes of the legislation as envisioned by Congress first requires that this Court ascertain those purposes by construing the federal statute and regulations. The Court must then determine whether the state law poses an obstacle to those objectives. *See Perez* v. *Campbell*, 402 U.S. 637, 644 (1971)(setting forth test in case involving state statute).

The Safety Act is predominantly concerned with decreasing the carnage resulting from automobile accidents where inadequate safety standards were followed by the industry and the user. S. Rep. No. 1301, at 2709-12; H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966)("Motor vehicle safety is the paramount purpose of this bill and each standard must be related thereto."). "[T]he Act was necessary because the industry was not sufficiently responsive to safety concerns. The Act intended that safety standards not depend on current technology and could be 'technology forcing' in the sense of inducing the development of superior safety design." *State Farm*, 463 U.S. at 49. The Administrator, consistent with this goal, stated that "[t]he explicit purpose of the Act [,...] is to enable the Federal Government to impel automobile manufacturers to develop and apply new technology to the task of improving the safety design of automobiles as readily as possible." 42 Fed. Reg. 34,289, 34,293 (1977)(quoting *Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659, 671 [6th Cir. 1972]). At the same time, a subsidiary purpose was Congress' intention that

the safety standards be uniform throughout the country. It is unclear, however, the extent to which this purpose is an end in itself or an outgrowth of the two basic concerns that emerged from the committee's hearings. Those concerns were first, that the promotion of voluntary standards had largely failed and that swift mandatory standards were necessary and second, that the primary responsibility for regulating the automotive industry "must fall squarely upon the Federal Government." S. Rep. No. 1301, at 2712. In the same passage of the Senate Report in which the need for uniformity is expressed, Congress also expressed its concern that states not be precluded from regulating motor vehicle safety.

> The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country. At the same time, the committee believes that the States should be free to adopt standards identical to the Federal standards ....
>
> The States are also permitted to set more stringent requirements for purposes of their own procurement. *Moreover, the Federal minimum safety standards need not, be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law.*

Id. at 2720 (emphasis supplied). The Administrator, consistent with these objectives, promulgated Standard 208.

The specific goals of Standard 208, while comporting generally with the above directives, have not remained consistent throughout its regulatory history. As noted by Mr.

Justice (now Chief Justice) Rehnquist. In his dissent in *State Farm*, "[t]he agency's changed view of the standard seems to be related to the election of a new President of a different political party." 463 U.S. at 59. As he there concluded, a change in administration "is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." *Id.* (discussing rescission of mandatory requirement of passive restraint systems). The perturbations of the Administrators during the regulatory life of Standard 208 make it no easy matter, however, for this Court to glean the regulatory purpose. The Administrator has mandated passive restraint requirements because of their safety benefits, see 49 Fed. Reg. 28.962 (1984)(mandating requirement unless states covering two thirds of the nation's population impose mandatory seat belt use laws by 1989); 42 Fed. Reg. 34,289 (1976); postponed the requirement because of safety concerns, see 41 Fed. Reg. 24,070 (1976); postponed the requirement because of public hostility and effectiveness concerns, 49 Fed. Reg. 28,962 (1984); and rescinded it, on grounds later found to be arbitrary and capricious. 46 Fed. Reg. 53,419 (1981). Based upon a study of the Administrator's discussion of Standard 208, especially with respect to the "optional regulations" in effect in 1976 and still in force today, this Court cannot devine any purpose other than an appropriate concern with the imposition of reasonable, practicable, and objective safety standards. Such a purpose is not frustrated by the potential that a state damage award may occur. Regardless of the so-called "regulatory impact" of such an award, this Court cannot, keeping in mind the presumption against preemption, find that the agency's and Congress' objectives would be thwarted, especially since Congress intended that "[c]ompliance with any Federal motor vehicle safety standard ... does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c).

Congress passed the Safety Act fully aware that damage suits would be initiated against parties who complied with the federal regulations. *See Shipp* v. *General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985)("Of course, compliance with such minimum safety standards does not exempt or immunize a manufacturer from common law strict liability . . . Certainly Congress did not intend such a result ...."). *See generally Larsen* v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (seminal second collision case finding liability notwithstanding compliance with federal standards). This Court therefore concludes, as the Supreme Court did in *Silkwood*, that Congress recognized and sanctioned this "tension" between compliance with federal regulations and state common law claims. *See Palmer*, 633 F. Supp. at 1179 (citing and following *Silkwood* for similar reasons in not finding preemption by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-41).

Even if this Court were to assume that the Administrator was predominantly concerned with the promulgation of uniform regulations with built in flexibility in deference to industry demands for a wide range of options, it nonetheless would conclude that the regulatory impact of a state damage award would not frustrate the full objectives

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[14]General Motors, in its argument for preemption, relies principally on *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) and *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141 (1982), both decided before *Silkwood*. In *Garmon*, the Supreme Court stated that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." 359 U.S. at 247, *noted in Silkwood*, 464 U.S. at 249. In *Garmon*, the Supreme Court held that the federal government occupied the field of National Labor Relations and that state law regulating conduct "only arguably protected by the National Labor Relations Act" is nonetheless preempted. The Supreme Court, in *Garmon*, was concerned that the National Labor Relations Board's ("NLRB") jurisdiction would be flouterd if litigants sidestepped its remedial scheme and instead opted

of the Administrator and Congress. The Supreme Court has only recently addressed this issue and found that the impact of such awards should be considered narrowly.[14]

In *Silkwood* v. *Kerr-McGee*, the Supreme Court ruled that simply because Congress occupied the nuclear energy field did not require a finding that it intended to preempt punitive damages awards. 464 U.S. at 256. The Supreme Court dismissed Kerr-McGee's contention that the award frustrated Congress' desire to promote nuclear power. It ruled that Congress did not intend to promote nuclear power "at all costs." *Id.* at 257. Congress was also concerned that nuclear power be developed safely. 42 U.S.C. § 2013(d). The Supreme Court inferred from this that Congress dis-

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for bringing state law claims. Recently, the Supreme Court, while discussing the National Labor Relations Act ("NLRA") and *Garmon*, articulated the different standards applied when the NLRB is involved. "[A] presumption of federal preemption applies even when the state law regulates conduct only arguably protected by federal law. Such a pre-emption rule avoids the potential for jurisdictional conflict between state courts or agencies and the NLRB by ensuring that primary responsibility for interpreting and applying this body of labor law remains with the NLRB.... *Garmon*, 359 U.S. at 244-45. This presumption of federal pre-emption [is] based on the primary jurisdiction rationale." *Brown* v. *Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 502 (1984). Thus, the Supreme Court's concern in *Garmon* is better understood as one with the primary jurisdiction of the NLRB and the exclusive application of its remedial scheme. The NLRA provided a specific avenue for redress for the petitioner in *Garmon*. "The Court's discussion of pre-emption of state common law claims must be read with that in mind." *Palmer*, 633 F. Supp. at 1175 n.3.

Normally, as in the case with the Safety Act, the presumption as to "arguably protected conduct" is just the opposite in preemption analysis. Further, the only relief for the Woods, where General Motors has complied with the federal safety regulation, is provided by a common law claim. *Cf.* 15 U.S.C. § 1400 (providing a cause of action for dealers where manufacturers fail to comply with the safety standards).

claimed any interest in promoting nuclear power at the expense of adequate remedies for those injured by exposure to nuclear materials. It concluded, therefore, that an award of punitive damages did not hinder the purposes of the Atomic Energy Act. 464 U.S. at 257. The Supreme Court also concluded that the allowance of punitive damage awards did not frustrate Congress' express intent to preclude dual regulation of radiation hazards. *Id.* The Supreme Court reasoned that it was not within its authority to second-guess Congress' belief that it was not inconsistent to vest exclusive regulatory authority over the safety aspects of nuclear development with a federal agency, yet permit recovery under state common law. In the case of the Safety

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In *De La Cuesta*, the other Supreme Court case relied upon by General Motors, the issue was whether a judge made determination that due-on-sale clauses in mortgage contracts would not be enforced at the lender's option was preempted by federal regulations issued by the Federal Home Loan Bank Board ("Board"). The regulations provided that a federal savings and loan association had the power to include and enforce due-on-sale clauses contained in their loan instruments. The Supreme Court focused its attention on whether the Board intended to preempt California's *Wellenkamp* doctrine. The *Wellenkamp* rule, as announced by the California Supreme Court in *Wellenkamp* v. *Bank of America*, 21 Cal. 3d 943, 582 P.2d 970 (1978), forbade California courts from enforcing due-on-sale clauses solely at the option of the lender. 458 U.S. at 155. After noting that compliance with the Board's permissive regulation on due-on-sale clauses and the *Wellenkamp* rule may not be a physical impossibility, the Supreme Court concluded that the doctrine nonetheless created "an obstacle to the accomplishment and execution of the full purposes and objectives 'of the due-on-sale regulation.' " Id. at 156 (quoting *Hines*, 312 U.S. at 67). In supporting its conclusion, the Supreme Court explained that the Board unequivocally expressed its determination to displace state law. The Supreme Court cited to the regulations' preamble and a recent pronouncement by the Board that due-on-sale practices "shall be governed *exclusively* by the Board's regulations in *preemption* of and without regard to any limitations imposed by state law ...." *Id.* at 158 (emphasis added)(citing 12 C.F.R. § 556.9(f)(2) (1982) and 41 Fed. Reg. 18,286, 18,287 [1976]).

Act, Congress was even more explicit in its acceptance of any possible inconsistencies between federal regulatory authority and recovery under state law in that it explicitly recognized the continuation of common law liability.

Further evidence of the Supreme Court's narrow view of the regulatory impact of common law damage awards is found in the dissents to *Silkwood*. While arguing against the majority's decision with respect to punitive damages, the four dissenters found no fault with the implicit conclusion that compensatory damages were not preempted. Justice Blackmun, writing for himself and Justice Marshall, stated that "[c]ompensatory damages therefore have an indirect impact on daily operations of a nuclear facility." 464 U.S. at 263. [15]Justice Powell, writing for all four dissenters, was much more emphatic. He stated that "[t]here is no element of regulation when compensatory damages are awarded." *Id.* at 276 n.3. In light of the Supreme Court's language, including that of the dissenters,

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The Board's intent to expressly preempt state law and to maintain flexibility for federal savings and loans is much more explicit than the purpose attributed to the administrator by General Motors. Further, the impact of the *Wellenkamp* rule is much more certain and akin to state regulations since the California courts' had placed the petitioner on notice that its courts would not be an open forum for the enforcement of such clauses. Far less certainty is implicated by potential common law damage awards.

[15]While other portions of Justice Blackmun's opinion address the purpose of compensatory damages, *see, e.g.*, 464 U.S. at 263 ("The crucial distinction between compensatory and punitive damages is that the purpose of punitive damages is to regulate safety, whereas the purpose of compensatory damages is to compensate victims") which purpose is arguably irrelevant to the regulatory effect of such awards, the quoted passage reflects Justice Blackmun's concern with the *impact* or effect of such awards.

and result in *Silkwood*, General Motor's argument for preemption is hardly compelling.

The combination of the Administrator's inconclusive purposes and the speculative nature of the regulatory impact of a potential award requires a ruling that neither Congress nor the Administrator intended to displace state common law awards. [16]

Based upon the foregoing, this Court denies General Motor's motion for summary judgment.

III.
MASSACHUSETTS PRODUCTS LIABILITY

General Motors' second contention is that this Court should conclude as matter of law that the failure to install a passive restraint system did not make the 1976 Blazer defective and unreasonably.dangerous under Massachusetts case law. The Woods' claim, as both parties point out, is based upon what is known as a crashworthy or second collision theory. "Crashworthiness" has been recognized as a basis for liability in Massachusetts since at least 1978. *Back* v. *Wickes Corp.*, 375 Mass. 633 (1978)(motor home with built-in propensity to explode under certain crash conditions); *Smith* v. *Ariens Co.*, 375 Mass. 620, 623-25 (1978) (approving reasoning in *Larsen* v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) that enhanced or second collision injuries are foreseeable as incidental to normal use of certain products and therefore negligence principles impose liability for such injuries). The *Larsen* court had reasoned that an interior or second collision between a driver and the steering column

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[16] It is for Congress and not this Court to resolve the possible "limitless" regulatory consequences created by the "tension" on this particular regulatory scheme. *See Silkwood*, 464 U.S. at 256; *Ferebee*, 736 F.2d at 1543; *Palmer*, 633 F. Supp. at 1179.

upon front end impact was caused by a safety defect in the car's design.

Under Mass. Gen. Laws ch. 106, § 2-314(2)(c), a seller warrants its product as "fit for the ordinary purposes for which such goods are used," which include the "uses intended by the manufacturer and those which are reasonably foreseeable." *Hayes v. Ariens Co.*, 391 Mass. 407, 410 (1984)(citing *Back* v. *Wickes Corp.*, 375 Mass. at 643). A claim for breach of the implied warranty of merchantability focuses on whether the defect renders the product unreasonably dangerous and therefore unfit for its ordinary use or purpose. Warranty liability neither imposes absolute liability nor the obligation that a manufacturer of a motor vehicle make its product collision-proof. *Back*, 375 Mass. at 640. A manufacturer is not an insurer of its user's safety. Nonetheless, a manufacturer must "anticipate the environment in which its product will be used, and it must design against the reasonably foreseeable risks attending the product's use in that setting." *Id.* at 640-41.[17]

General Motors would have this Court rule, as matter of law, that the 1976 Blazer was fit for its intended purposes and therefore not defective. The question posed, however, is one that can only be properly answered by that most vital exercise of direct democracy — the American jury. "[T]he question of fitness for ordinary purposes is largely one centering around reasonable consumer expectations." *Venezia* v. *Miller Brewing Co.*, 626 F.2d 188, 190 (1st Cir. 1980) (citing *Back*, 375 Mass. at 642)(deliberate misuse of

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[17]The Supreme Judicial Court has stated repeatedly that the remedy of warranty liability is "fully as comprehensive as that provided by § 402A of the Restatement [(Second) of Torts (1965)]." *Mason* v. *General Motors Corp.*, 397 Mass. 183, 189 (1986)(quoting *Swartz* v. *General Motors Corp.*, 375 Mass. 628 [1978]).

otherwise reasonably safe product not an intended use within expectation of consumer).

> In deciding this issue, the *jury* must weigh competing factors much as they would in determining the fault of the defendant in a negligence case ... the jury should consider, among other factors, "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design."

Back, 375 Mass. at 642 (quoting *Barker* v. *Lull Engineering Co.*, 20 Cal. 3d 413, 431, 143 Cal. Rptr. 225, 573 P.2d 443 [1978])(emphasis added). The balancing test envisioned by the Supreme Judicial Court is to be conducted within the province of the jury and based upon evidence adduced at trial.[18] This Court cannot conclude at this preliminary stage that as matter of law the Woods cannot recover under Massachusetts case law for their injuries, whether under a negligence or a breach of implied warranty theory.[19]

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[18]Evidence on the economic and mechanical feasibility of airbags in 1976 is an example of the evidence to be weighed by the jury in deciding whether the 1976 Blazer was defective and unreasonably dangerous. At the same time, testimony that Patricia Wood was not wearing her seatbelt may be evidence of "unreasonably proceeding to use a product which [she knew] to be defective" thereby causing her to relinquish her protection under an implied warranty theory. *Correia* v. *Firestone Tire & Rubber Co.*, 388 Mass. 342 (1983); *see Allen* v. *Chance Manufacturing Co.*, 398 Mass. 32 (1986). Of course, this Court makes no ruling on any of these issues at this time.

[19]This Court notes that neither party has requested certification of this issue to the Supreme Judicial Court pursuant to Rule 1:03 of the Rules of the Supreme Judicial Court of Massachusetts, nor does this

General Motors' motion for partial summary judgment on the alleged violation of Mass. Gen. Laws ch. 93A is similarly denied since a finding by the jury that General Motors breached an implied warranty of merchantability would conclusively decide that ch. 93A, § 2 was violated. *Burnham* v. *Mark IV Homes, Inc.*, 387 Mass. 575, 581 (1982)(citing *Hannon* v. *Original Gunite Aquatech Pools, Inc.*, 385 Mass. 813, 821 [1982][did not decide issue]); *Goldstein Oil Co.* v. *C.K. Smith Co.*, 20 Mass. App. Ct. 243, 247, *rev. denied*, 395 Mass. 1104 (1985); 940 C.M.R. § 3.08(2) (1978).

IV.
LOSS OF CONSORTIUM

General Motors contends that Francis and Elizabeth Wood have no legally cognizable claim for loss of consortium and that this aspect of their claim must necessarily be dismissed. The Woods oppose the motion arguing that, although Patricia Wood had reached the age of majority shortly before this incident, they should be allowed to recover for their loss under the factual circumstances

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Court believe that such an approach is warranted. While this Court is not aware of any reported case which holds that liability can be imposed upon a manufacturer for failing to equip a vehicle with a passive restraint system, *see Vanover* v. *Ford Motor Co.*, 632 F. Supp. 1095, 1098 (E.D. Mo. 1986)(granting summary judgment under Missouri law), there is also no impediment to such a theory under Massachusetts law. General Motors' reliance on *Mavilia* v. *Stoeger Industries*, 574 F. Supp. 107, 111 (D. Mass. 1983) (granting summary judgment on the grounds that a handgun is not unreasonably dangerous) is inapposite due to the extremely different nature of the product involved in that case. Consumers expect that a gun may cause fatal injuries since that is one of its essential purposes. Consumers do not expect to encounter a similar high degree of risk of fatality when operating a motor vehicle.

presented. This is a matter of first impression in a rapidly evolving area of Massachusetts law.

At the time of her injury in May, 1981, Patricia Wood was an eighteen year-old student residing with her parents and in need of their financial support. As a result of her injuries, the Woods allege that they have experienced severe emotional trauma and the loss of companionship and society of their daughter. The issue presented is whether parents have an independent cause of action for loss of consortium when tortious injury is inflicted upon their adult, but unemancipated child.

In *Ferriter* v. *Daniel O'Connell's Sons, Inc.*, 381 Mass. 507 (1980), Massachusetts became the first state in the nation to allow recovery for a minor child's loss of companionship and consortium of a parent. *See DeLoach* v. *Companhia de Navegacao Lloyd Brasileiro*, 782 F.2d 438, 440 (3d Cir. 1986)(After *Ferriter*, "[i]n the next few years five other states followed that lead: Michigan, Iowa, Wisconsin, Washington, and Vermont").[20] In a recent Massachusetts Appeals Court decision, the court extended the reasoning of *Ferriter* to allow recovery by a handicapped adult for the loss of consortium of a parent. *Morgan* v. *Lalumiere*, 22 Mass. App. Ct. 262, *rev. denied*, 398 Mass. 1103 (1986). The court stressed that its decision was consistent with the "humane policies" underlying *Ferriter*. Although Morgan was thirty years old at the time of the accident, and therefore not a minor, the court indicated that to focus on a particular age was arbitrary and less crucial than the circumstances surrounding the filial relationship. In *Morgan*, the child was severely handicapped, lived at home, and was cared for by his mother prior to her accident. Thus, he was dependent both for economic support and for "closeness, guidance, and

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[20]At least eight other courts that have addressed the issue since 1980 have denied recovery. *DeLoach*, 782 F.2d at 440.

nurture." *Ferriter*, 381 Mass. at 516, *quoted in Morgan*, 22 Mass. App. Ct. at 270.

Since Massachusetts will permit a minor child to recover for the loss of companionship and consortium of a parent, *Ferriter* v. *Daniel O'Connell's Son's, Inc.*, 381 Mass. 507 (1980), and has extended this right to recovery to a handicapped adult who has lost the consortium of a parent, *Morgan* v. *Lalumiere*, 22 Mass. App. Ct. 262, *rev. denied*, 398 Mass. 1103 (1986), it remains to consider whether the reverse is true, i.e., whether in Massachusetts a parent may recover for the loss of companionship and consortium of an unemancipated child who has but recently attained the age of majority. Neither the Massachusetts Supreme Judicial Court nor the Massachusetts Appeals Court have yet addressed this question. "In such circumstances, it is appropriate to look to the decisions of the Massachusetts Superior Court, 'the great trial court of the Commonwealth,' as declarative of Massachusetts law," *Pierce* v. *Dew*, 626 F. Supp. 386, 387 (D. Mass. 1986); *see Local Div. 589, Amalgamated Transit Union* v. *Massachusetts*, 666 F.2d 618, 626 n.21, 645 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982); *Flotech, Inc.* v. *E.I. DuPont de Nemours Co.*, 627 F. Supp. 358, 372 (D. Mass. 1985), *aff'd* No. 86-1146, slip op. (1st Cir. March 18, 1987), especially where it has been expressly stated that a decision of the Superior Court, unless modified or reversed by a court of appropriate jurisdiction, is the law of the Commonwealth in the county in which it is rendered. *Commonwealth* v. *DeArmas*, 397 Mass. 167, 173 (1986) (Liacos, J., concurring).

On the issue of whether, in Massachusetts, a parent may recover for the loss of companionship and consortium of an unemancipated child, however, at least two justices of the Superior Court have reached different conclusions. In 1985, while serving as a justice of the Superior Court, I concluded

"that the interests of justice and the mores of the Commonwealth require recognition of this tort." *Prince-Jackson* v. *Children's Hospital Medical Center,* No. 72943, slip op. (Mass. Superior Ct. April 8, 1985) (Young, J.); *accord Shoekley* v. *Prier*, 66 Wis. 2d 394, 225 N.W.2d 495 (1975). *But see* W. Prosser and W. Page Keeton, *The Law of Torts* § 125, at 934 (4th ed. 1984)("Although the decision [in *Shoekley*] has had the support of some writers, who have shown that the traditional arguments against recovery for loss of a child's society and affections are not always convincing, there is virtually no support for this kind of action in the courts ....")(footnotes omitted). Indeed, in 1986, another justice of the Superior Court rejected a parent's claim for the loss of consortium for a minor child, *Schebel* v. *General Motors Corp.*, No. 85-1574 (Mass. Superior Ct. June 25, 1986) (Murphy, J.)(order granting summary judgment) and, more recently, a colleague on the District Court concluded that the Massachusetts appellate courts would not recognize such a right in parents to claim the loss of consortium of a minor child. *Rogers* v. *Baker Industries*, No. 86-0395-MA, slip op. (D. Mass. August 20, 1986).

It is important to understand the different perspective through which it is now my duty to view this issue. As a justice of the Superior Court — one of America's great common law courts — it was my duty, in the absence of appellate decisions on point, to declare the common law of the Commonwealth consistent with the mores and needs of her people. This I sought to do in *Prince-Jackson*. As a federal judge interpreting Massachusetts law in the absence of a controlling decision by the highest court of the Commonwealth, however, my function is only a predictive one, i.e., what will the Massachusetts Supreme Judicial Court declare when it eventually confronts this issue? *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967).

Engaging in this predictive function, this Court — at least at the present stage of this litigation — adheres to the decision in *Prince-Jackson*[21] and makes the "limited extension," *Morgan*, 22 Mass. App. Ct. at 270, of the policies underlying *Ferriter* and its progeny necessary to deny the motion to dismiss the loss of consortium claim.

At the time of this incident Patricia Wood lived at home, apparently contributing the benefits of her presence and companionship to the care and comfort of her parents. The notion that a parent's recovery is limited to the loss of a child's earning capacity is based upon master and servant principles not relevant to today's family relationships. *Shoekley*, 225 N.W. 2d at 497. Loss of companionship and society and the shared experiences of a family unit more accurately represent the loss caused by the tortious conduct of a third party. This loss ought not be instantly extinguished upon the reaching of the age of majority, especially where the unemancipated child continues to live at home with her family.

The Supreme Judicial Court stated in *Ferriter* that "[a]s claims for injuries to other relationships come before us, we shall judge them according to their nature and their force." 381 Mass. at 516 (footnote omitted). This counsels the development of a full record so that the "nature and ... force" of this particular relationship may be properly evaluated. It

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[21]It is instructive for a judge to be required to review one's own decision to see whether it has withstood the passage of time. At this remove, while the result may well be correct, I can see that my decision in *Prince-Jackson* unduly emphasizes the grief attendant upon the maiming or death of a child. A loss of consortium claim, however, does not compensate one for grief stemming from injury to a loved one but rather for damage to a beneficial relationship which, but for the intervention of the tortfeasor, would have continued undamaged. *See generally* Lowe, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 Ind. L.J. 590 (1976).

will be time enough, therefore, to certify this issue to the Supreme Judicial Court for determination, Rule 1:03 of the Rules of the Supreme Judicial Court, should Francis and Elizabeth Wood recover a jury verdict on their loss of consortium claim.

For the reasons stated above, therefore, both General Motors' motion to dismiss and its motion for summary judgment are DENIED.

SO ORDERED.

/s/William G. Young

UNITED STATES DISTRICT JUDGE

Dated May 8, 1987

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1750

PATRICIA M. WOOD, ET AL.,
Plaintiffs, Appellees,

v.

GENERAL MOTORS CORPORATION,
Defendant, Appellant.

JUDGMENT

ENTERED: DECEMBER 28, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The order of the district court is reversed and the cause is remanded to the district court for further proceedings consistent with the opinion filed this date.

Costs to General Motors Corporation.

By the Court,

/s/Francis F. Scigliano
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1750

PATRICIA M. WOOD, ET AL.,

Defendants, Appellees,

v.

GENERAL MOTORS CORPORATION,

Plaintiff, Appellant.

Before
Campbell, *Chief Judge,*
Selya, *Circuit Judge,*

Laffitte. **District Judge*

ORDER OF COURT
Entered: February 7, 1989

Upon consideration of appellees petition for rehearing.

It is ordered that said petition be and the same hereby is denied.

By the Court:

/s/Francis P. Scigliano
Clerk.

* Of the Distrit of Puerto Rico, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1750

PATRICIA M. WOOD, ET AL.,
Defendants, Appellees,

v.

GENERAL MOTORS CORPORATION,
Plaintiff, Appellant.

Before
Campbell, Chief Judge

Bownes, Breyer, Toruella and Selya, Circuit Judges.

ORDER OF COURT
Entered: February 7, 1989

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing enbanc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard of reheard by the Court enbanc.

It is ordered that the suggestion for rehearing enbanc be hereby denied.

By the Court:

/s/Francis P. Scigliano
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1750

PATRICIA M. WOOD, ET AL.,
Defendants, Appellees,

v.

GENERAL MOTORS CORPORATION,
Plaintiff, Appellant.

Before

Campbell, Chief Judge,

Selya, Circuit Judge,
Laffitte.* District Judge

ORDER OF COURT
Entered: May 25, 1989

Upon consideration of "Appellee's Motion to Revoke Issuance of Mandate and Renewed Request for Rehearing, In Banc" and the opposition thereto,

It is ordered that said motion be and the same hereby be denied.

By the Court:

/s/Francis P. Scigliano
Clerk

* Of the District of Puerto Rico, sitting by designation.

Relevant Excerpts From 49 C.F.R. § 571.208
No. 208, OCCUPANT CRASH PROTECTION.

S1. *Scope*. This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose*. The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

* * *

S4.1.2 *Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986.* Each passenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option—frontal/angular automatic protection system. The vehicle shall:*

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c)*Either.*(1)Meet the lateral crash protection requirements of S5.2 and the rollover crash protec-

tion requirement of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3 and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 *Second option—head-on automatic protection system.* The vehicle shall—

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b)At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 *Third option—lap and shoulder belt protection system with belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard and at each front designated seating position have a seat belt warning system that conforms to S7.3.

* * *

S4.2.1 *Trucks and multipurpose passenger vehicles, with GVWR of 10,000 pounds or less manufactured from January 1, 1972 to December 31, 1975.*

* * *

S4.2.1.2 *Second option—belt system.* The vehicle shall have seat belt assemblies that conform to Standard 209 installed as follows:

(a) A Type 1 or Type 2 seat belt assembly shall be installed for each designated position in convertibles, open-body type vehicles, and walk-in van-type trucks.

(b)In all vehicles except those for which requirements are specified in S4.2.1.2(a), a Type 2 seat belt assembly shall be installed for each outboard designated seating position that includes the windshield header within the head impact area, and a Type 1 or Type 2 seat belt assembly shall be installed for each other designated seating position.

S4.2.2. *Trucks and multipurpose passenger vehicles with GVWR of 10,000 pounds or less, manufactured on or after January 1, 1976.* Each truck and multipurpose passanger vehicle with a gross vehicle weight rating of 10,000 pounds or less, manufactured on or after January 1, 1976, shall meet the requirements of S4.1.2.1 or, at the option of the manufacturer, S4.1.2.2. or S4.1.2.3 (as specified for passenger cars), except that forward control vehicles manufactured prior to September 1, 1981, convertibles, open-body type vehicle, walk-in van-type trucks, motor homes, vehicles designed to be exclusively sold to the U.S. Postal Service and vehicle carrying chassis-mount campers may instead meet the requirements of S.4.2.1.2.